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THE INDIAN LAW REPORTS, CALCUTTA SERIES,

CONTAINING

CASES DETERMINED BY THE HIGH COURT AT CALCUTTA AND
BY THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL
ON APPEAL FROM THAT COURT AND FROM ALL
OTHER COURTS IN BRITISH INDIA NOT
SUBJECT TO ANY HIGH COURT.

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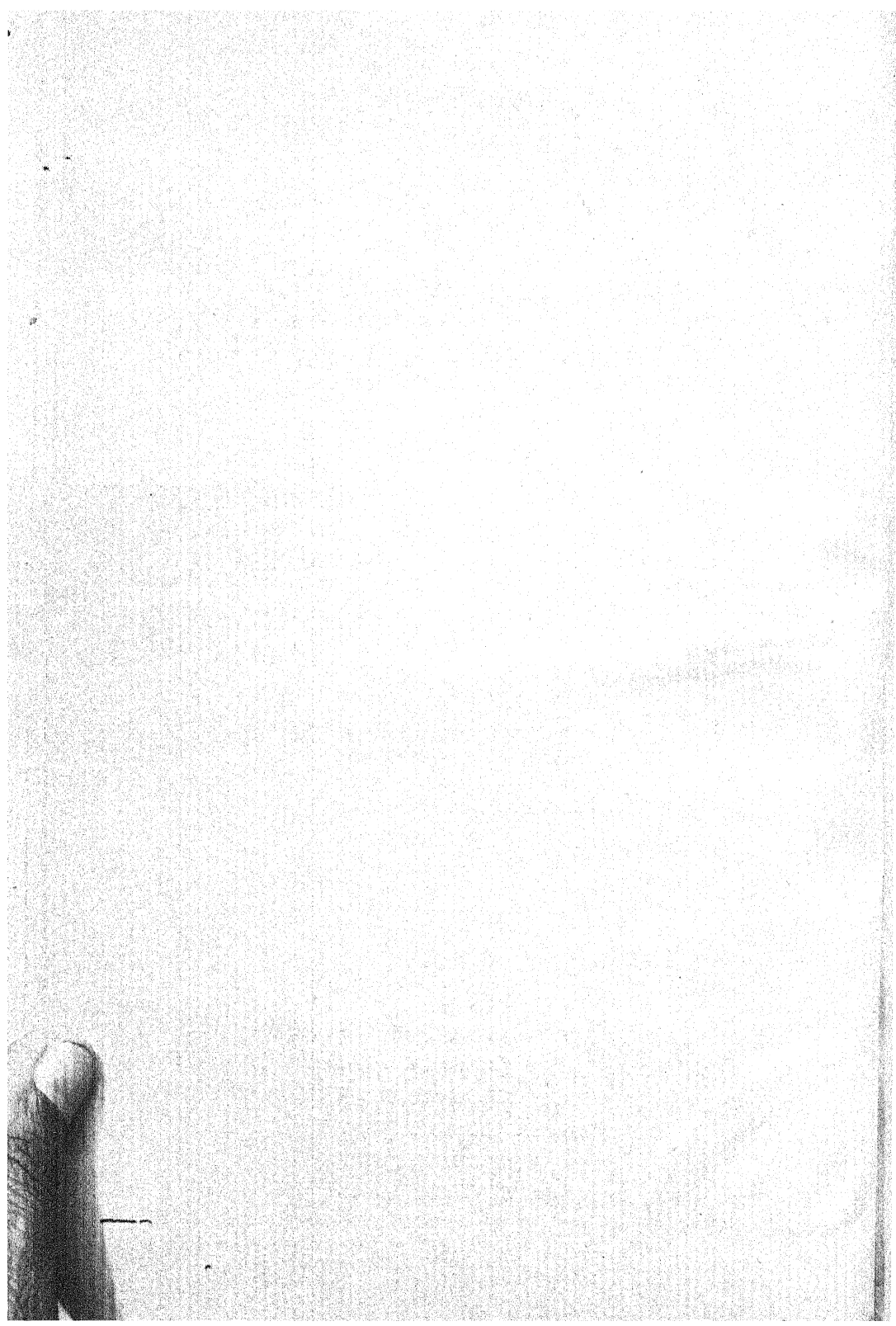
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JUDGES OF THE HIGH COURT.

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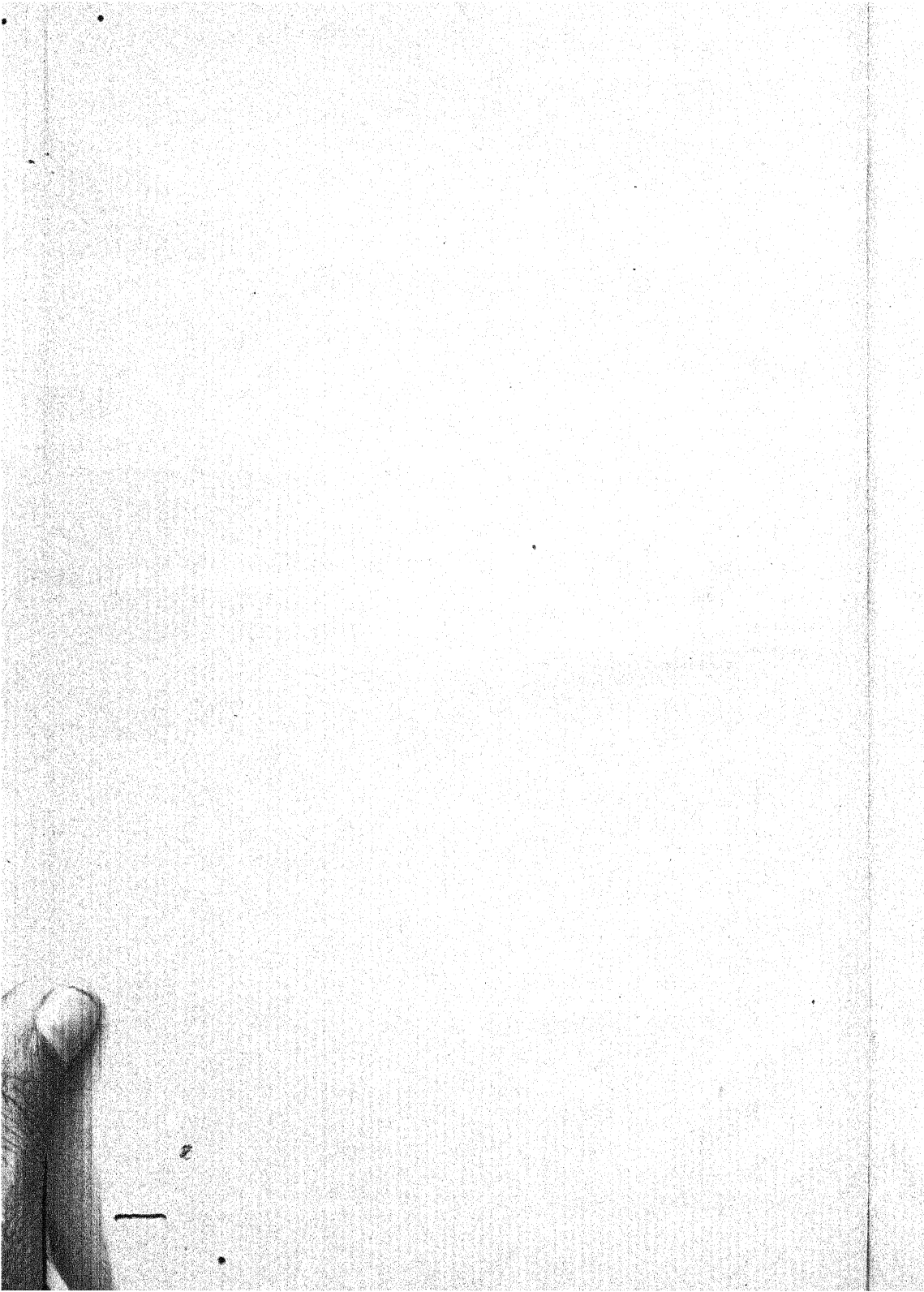
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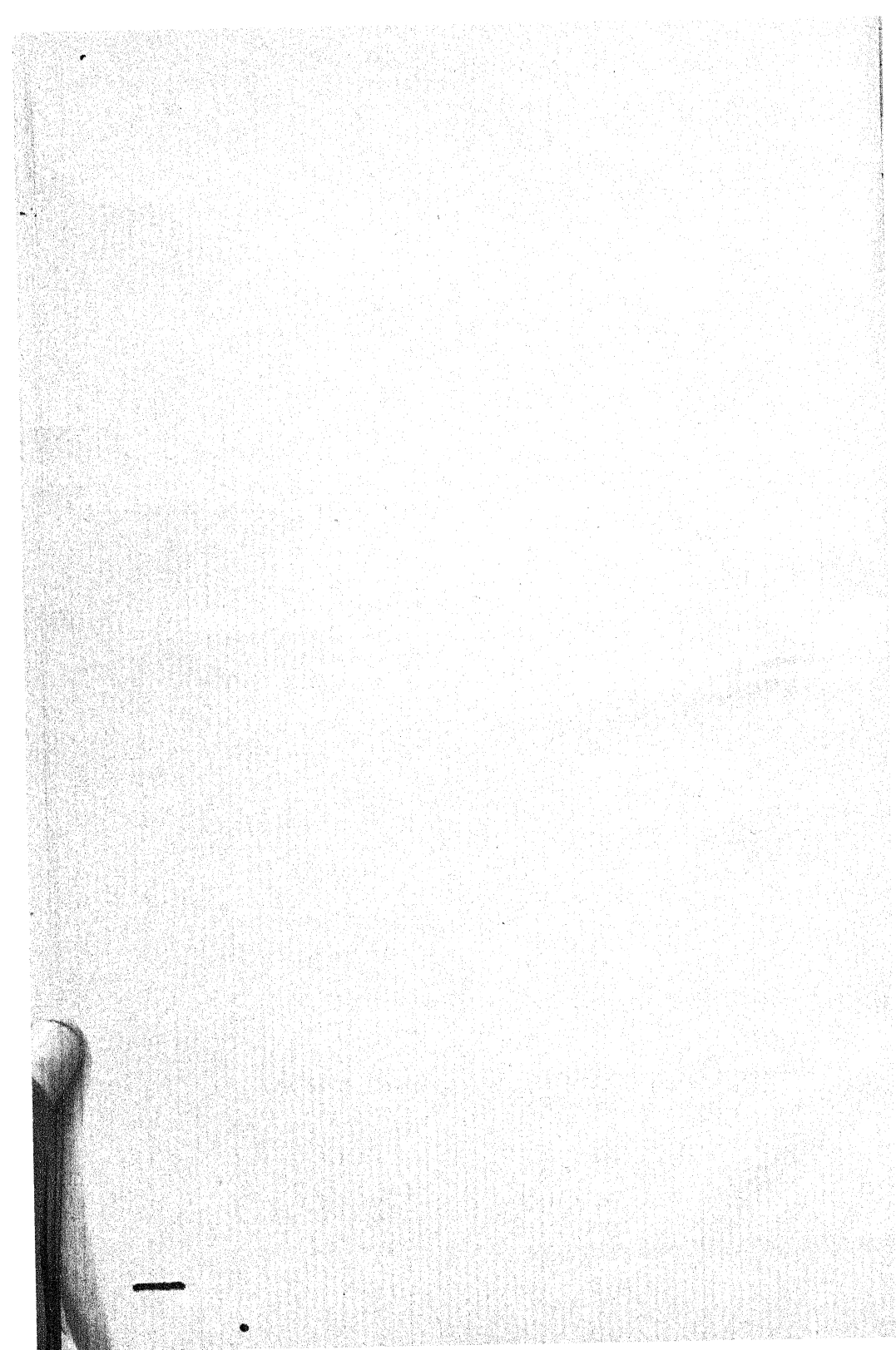


ADDENDA AND CORRIGENDA.

Page 42, heading to case, *for* "Recreation," *read* "Revocation."

„ 76, line 27, *for* "usually," *read* "morally."

„ 174, line 10, *for* "then," *read* "thus."



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THE
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APPELLATE CIVIL.

Before Mr. Justice Markby and Mr. Justice Mitter.

NARAIN DHARA (PLAINTIFF) v. RAKHAL GAIN, GUARDIAN OF
JONARDON (DEFENDANT).*

1875
March 6.

*Hindu Law—Inheritance—Sudras—Illegitimate Sons—Validity of Marriage
between persons of different Castes.*

According to the doctrines of the Bengal school of Hindu law, a certain description only of illegitimate sons of a sudra by an unmarried sudra woman is entitled to inherit the father's property in the absence of legitimate issue, viz., the illegitimate sons of a sudra by a female slave or a female slave of his slave.

Per MITTER, J.—Marriage between parties in different subdivisions of the sudra caste is prohibited unless sanctioned by any special custom, and no presumption in favour of the validity of such a marriage can be made, although long cohabitation has existed between the parties.

Per MARKBY, J.—*Quære*, whether there is any legal restriction upon such a marriage?

SUIT to recover certain property, which had admittedly belonged to one Radhoo, deceased, of whom the plaintiff was the brother and heir. The defendant resisted the claim, alleging that she was the widow of Radhoo, and that her minor son by him was, by Hindu law, a preferential heir to the plaintiff.

* Special Appeal, No. 737 of 1874, against a decree of the Judge of Zilla Midnapore, dated 30th December, 1873, affirming a decree of the Munsif of Tumlook, dated 19th September, 1873.

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Radhoo was of the kaivertta (fisherman) caste. The material allegations upon which the defence rests were contained in the third paragraph of the written statement, which was to the following effect :

"Although originally the aforesaid Radhoo was a separated brother of the plaintiff, yet he, forsaking his own caste, remarried me, who am of the tanti (weaver) caste, according to the custom of the tanti caste. Thus being united as husband and wife we were living together for at least twenty years, and my son, born of his loins, performed the funeral rites of the deceased Radhoo, and bore tokens of impurity according to the usage of his own caste. The plaintiff did not either bear the tokens of impurity, or perform his shradh."

Issues were raised as to whether the defendant was the mistress of Radhoo or his lawfully married wife, and whether the plaintiff or the son of the defendant was the legal heir of Radhoo, and entitled to succeed to his property.

The Munsif held that the validity of the marriage was not established: but being of opinion that an illegitimate son of a sudra was by Hindu law a preferential heir to a brother, he dismissed the suit. On appeal the Judge upheld that decree, both on the ground of the defendant's son's preferential right to succeed, and also on the ground that, as it was shown that the defendant lived with Radhoo as his wife for twenty years, the marriage might be presumed, the onus being on the plaintiff to disprove it, which he had not succeeded in doing. The plaintiff preferred a special appeal to the High Court, on the ground that the defendant being an illegitimate son could not succeed; that the marriage could not in such a case be presumed, and that the fact of Radhoo having been of a different caste from the defendant showed that no marriage could have taken place between them.

Baboo *Doorga Mohun Doss*, for the appellant, contended that, although by Hindu law certain illegitimate sons were allowed to inherit, yet they were limited in the case of sudras to the sons of the fifteen descriptions of female slaves expressly enumerated by the law; see Colebrooke's Dig., Bk. iii, Chap. ix,

v. 29 ; Vyavahara Mayuka, Chap. x, v. 5 ; and Dayakrama Sangraha, Chap. xii, s. 1, v. 3 ; and that the defendant's mother not being shown to be one of that description, her son was not entitled to inherit. He cited 2 Macnaghten's Hindu Law, 15 ; Dayabhaga, Chap. ix, vv. 29 and 31 ; Mitakshara, Chap. i, s. 12 ; Menu, Chap. ix, v. 179 ; Dattaka Chandrika, s. 5, v. 30 ; and Colebrooke's Dig., Bk. v., Chap. iii, v. 174.

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Baboo *Kali Mohun Doss*, for respondent, contended that the authorities extended the right of inheritance of an illegitimate son of a sudra beyond the sons of the enumerated description of female slaves ; such right also extended to the sons of a woman who had been continuously living with the father : he submitted that the defendant was a preferential heir to the plaintiff. He relied on the case of *Inderan Valungypuly Taver v. Ramaswamy Pandia Talaver* (1), and referred to Shama Charan's *Vyavastha Darpana*, 2nd ed., pp. 638, 639, and 913 to 915 ; Dayabhaga, Chap. ix, v. 29 ; *Datti Parisi Nayudu v. Datti Bangaru Nayudu* (2) ; *Muttusamy Jagavira Yettapa Naikar v. Venkatasubha Yettia* (3) ; *Pandaiya Telaver v. Puli Telaver* (4) ; *Nissar Murtojah v. Kowar Dhunwunt Roy* (5) ; and *Chnoturya Run Murdun Syn v. Sahib Purkulad Syn* (6).

The following judgments were delivered :—

MITTER, J. (after shortly stating the facts, and reading the portion of the written statement set out, continued) :—From the foregoing statement it is clear that the defendant put the legality of her marriage, and consequently the legitimacy of her son, upon a social custom obtaining among her caste people.

The contention raised in special appeal is that the decision of the lower Court, both on the question of the validity of the marriage and the heritable rights of an illegitimate son of a sudra, is erroneous in law ; and I am of opinion that this contention is valid. After having expressed his opinion that

(1) 3 B. L. R., C. P., 1.

(2) 4 Mad. H. C., 204.

(3) 2 Mad. H. C., 293.

(4) 1 Mad. H. C., 478.

(5) Marsh., 609.

(6) 7 Moore's I. A., 1.

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an illegitimate son of a sudra under the Hindu law inherits his putative father's property, the District Judge, with reference to the question of marriage, says :—" But more than this I am not at all sure that the son is illegitimate ; the defendant lived as his wife with Radhoo for twenty years, and still asserts that she was married to him. The marriage therefore may, I think, be presumed, and the disproof of it lies upon the plaintiff. I cannot say that he has succeeded in disproving it."

In an ordinary case, where it is established that parties have lived together as husband and wife for a long length of time, it is consonant with natural justice to presume a valid marriage between them ; and I am not aware of any peculiar provision in the Hindu law which is inconsistent with such a presumption as this. But in this case there is no room for it, for the parties are of different castes, and a valid marriage between them is impossible, unless sanctioned by any peculiar social custom governing them ; see Vyavastha Darpana, p. 1038, and Ward's Account of the Hindus, vol. i, p. 94. It is for this reason we find that the defendant, in her written statement, alleges that the marriage between her and the deceased Radhoo was valid by the usage obtaining amongst her caste people. Of this custom she has given no evidence, and it is possible that the attention of the parties was not called to this matter on account of the form in which the issue regarding the legitimacy of the defendant's son has been framed. But it is clear that, upon the materials upon the record, the lower Appellate Court, having regard to the particular facts of this case, was legally not warranted in making any presumption in favor of the validity of the alleged marriage between the defendant and the deceased Radhoo. Therefore the judgment of the District Judge upon this matter is erroneous in law.

The next question we have to consider in this case is whether or not an illegitimate son of a sudra can succeed to the property of his putative father. The lower Courts have relied upon a decision of the Judicial Committee of the Privy Council, quoted in Cowell's Lectures, 1870, page 171, in support of their view—*Inderan Valungypuly Taver v. Ramaswamy Pandia Talaver* (1).

(1) B. L. R., P. C., 1.

It is a Madras case; and before discussing whether it is applicable or not, it will be better to examine the authorities of the Bengal school of the Hindu law bearing upon the question before us.

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In the Dayabhaga, the leading authority of the Bengal school, the passage which is supposed to favor the contention of the illegitimate son is to be found in v. 29 of Chap. ix. This chapter deals with the subject of the participation of sons by women of various tribes, and v. 2 clearly shows that they are not illegitimate sons, but legitimate issue of married wives of various tribes, the shasters in ancient time legalising intermarriage. But in the present age, the provisions relating to intermarriage are not extant, but have become obsolete. Therefore it is questionable whether the provisions of that chapter are binding now; see note, p. 14, Vyavastha Darpana. But passing over that objection, let us see how far the passage quoted supports the view of the law taken by the Courts below. The v. 29, as translated by Mr. Colebrooke, runs thus:—"But the son of a sudra, by a female slave or other unmarried sudra woman, may share equally with other sons, by consent of the father. Thus Menu says—'A son, begotten by a man of the servile class on his female slave, or on the female slave of his slave, may take a share of the heritage, if permitted: thus is the law established.'" The passage as translated certainly warrants the conclusion that an illegitimate son of a sudra by a slave or other unmarried sudra woman takes the inheritance of the father: but referring to the original text, I find that there is a slight inaccuracy of translation in the first part of the verse in question. The passage, if correctly rendered, would run thus:—"But the son of a sudra by an unmarried female slave, &c., may share equally with other sons, by consent of the father, &c." There is a similar inaccuracy in v. 31, which should stand thus: "Having no other brother begotten on a married woman (he) may take the whole property: provided there be not a daughter's son. So Yajnavalkya ordains:—'One who has no brother may inherit the whole property for want of daughter's sons.' But if there be a daughter's son, he shall share equally with him; for no special provision occurs:

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and it is fit that the allotment should be equal; since the one, though born of an unmarried woman, is son of the owner, and the other, though sprung from a married woman, is only his daughter's son."

These passages as corrected will appear to accord with the quotation from Menu in v. 29 (1), which has been cited as their authority; but as they stood before they would seem to go much further than the text of Menu warranted. Therefore it is evident from these verses, if we read them correctly, that they do not lay down that all illegitimate sons of sudras inherit their father's property, but only a particular class,—*viz.*, those "begotten by a man of the servile class on his female slave or on the female slave of his slave." In Mitakshara, Chap. i, s. 12, there occur the following passages:—

"1. The author next delivers a special rule concerning the partition of a sudra's goods. 'Even a son begotten by a sudra on a female slave may take a share by the father's choice. But if the father be dead, the brethren should make him partaker of the moiety of a share: and one who has no brothers may inherit the whole property in default of daughters' sons.'

"2. The son begotten by a sudra on a female slave obtains a share by the father's choice, or at his pleasure. But after (the demise of) the father, if there be sons of a wedded wife, let these brothers allow the son of the female slave to participate for half a share: that is, let them give him half (as much as is the amount of one brother's) allotment. However, should there be no sons of a wedded wife, the son of the female slave takes the whole estate, provided there be no daughters of a wife, nor sons of daughters. But if there be such, the son of the female slave participates for half a share only.

"3. From the mention of a sudra in this place (it follows that) the son begotten by a man of a regenerate tribe on a female slave does not obtain a share even by the father's choice, nor the whole estate after his demise. But if he be docile he receives a simple maintenance."

The same rule of law is to be found in the Dattaka Chandrika, s. 5, v. 30, and the third volume of Colebrooke's Digest, Bk. v.,

(1) Of Chap. ix.

v. 174 (the aforesaid inaccuracy of translation as has been pointed out before also occurs in Bk. v., v. 174 of Colebrooke's Digest).

From all these texts of the Hindu law, it is evident that so far as the districts governed by the Bengal school of the Hindu law are concerned, the lower Courts are not correct in laying down broadly that all illegitimate sons of sudra succeed to the inheritance of their father. Sir W. Macnaghten also takes the same view of the law. In his treatise on Hindu law, vol. i, p. 18, he says :—"Among the sons of the sudra tribe, an illegitimate son by a slave girl takes with his legitimate brothers a half share, and where there are no sons (including son's sons and grandsons) but only the son of a daughter, he is considered as a co-heir, and takes an equal share." In a note in page 15 of the second volume of the same work, he observes :—"According to the Hindu law, the illegitimate son of a sudra man by a female slave, or a female slave of his slave, may inherit, but not the illegitimate child of any of the three superior classes. It appears in this case that the parties are sudras; but it is not distinctly stated whether the eldest brother died previously or subsequently to the death of any or all of his other three brothers, or whether the woman on whom the plaintiff was begotten by him was one of the fifteen descriptions of slaves, or was merely a concubine. If the woman were his slave, and the other three brothers died before the eldest, then the son begotten by him on the female slave would be entitled to the entire property. On the other hand, if one or more of the brothers died subsequently to the death of the eldest brother, the illegitimate son would be entitled to claim only such portion as belonged to his putative father, there being no law admitting the son of a sudra by a female slave to share the estate of the collaterals. If the woman were not his female slave, the son begotten on her by him would have no right to the inheritance, but only a claim to maintenance; and under no circumstances could the son of the sister begotten as above have any right to succeed to his mother's brothers."

From an examination of these authorities, it is clear that, according to the doctrines of the Bengal school of the Hindu

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law, a certain description of illegitimate sons of a sudra by an unmarried sudra woman is entitled to inherit to their father's property in the absence of legitimate issue. It has never been contended, far from being established, in this case, that the minor son of Radhoo, whose right has been set up by the defendant in answer to the plaintiff's claim, falls within that class. Consequently, that son is not entitled to inherit to Radhoo's property: and he being put out of the way, the plaintiff's right is clearly established. Therefore the decisions of the lower Courts are opposed to the provisions of the Hindu law.

We have next to determine whether the conclusion at which the Courts below have arrived can be supported upon the authority of the decision of the Judicial Committee of the Privy Council quoted by them (1).

Two questions were at issue in that case, *viz.*, 1st, "whether there was a marriage in fact; and secondly, if there was a marriage in fact, then whether there was a marriage in law." Upon the evidence, the first question was decided in the affirmative. "Then if there was a marriage in fact," their Lordships observe, "was there a marriage in law? When once you get to this, *viz.*, that there was a marriage in fact, there would be a presumption in favor of there being a marriage in law."

Having made this presumption, their Lordships proceed to examine the grounds upon which it was contended that, notwithstanding that presumption, the marriage was invalid in law. The ground upon which this contention was founded was, that the father of the mother of the plaintiff in that case was illegitimate, therefore the child of that father, being an *out-caste*, could not contract a valid marriage. After observing that there is no authority to support any such proposition as that which is contended for, they further observe:—"Though their Lordships do not agree in everything that has been stated in the Court of Appeal, they are satisfied that in the sudra caste illegitimate children may inherit and have a right to maintenance."

(1) *Inderan Valungypuly Taver v. Ramaswamy Pandia Talaver*, 3 B. L. R., P. C., 1.

They, therefore, clearly do not entirely endorse the view taken by the High Court of Madras in that case (1). Referring to that judgment, it appears that that Court held that the son of a sudra and of a woman between whom there has been no formal ceremony of marriage inherits his putative father's property. Their Lordships expressly say that they do not wholly concur with the Madras High Court in laying down this as a correct proposition of law; but they say that, in the sudra caste, illegitimate children may inherit and have a right to maintenance, or may inherit in certain cases and have a right to maintenance in all cases. Such a proposition as this is clearly consonant with the authorities we have been examining in this case; and the effect of that observation in that particular case before their Lordships was to show that the argument of the party contending against the validity of the marriage was based upon the assumption that an illegitimate child is necessarily an outcaste,—an assumption not true in all cases. It appears to me, therefore, that the decision quoted by the lower Courts, far from supporting their conclusion, goes in a great way to show that an illegitimate child does not necessarily in all cases possess heritable rights, even amongst the sudras.

For these reasons I think that the decision of the lower Courts upon the materials now upon the record cannot stand. But from the nature of the issues laid down in the Munsiff's Court, it appears to me that the question of custom, which was distinctly raised in the defendant's written statement, and in fact upon which the defendant's case was solely made to rest, was wholly lost sight of in both the Courts below. It is possible, therefore, that in respect of this particular matter of the defendant's defence, she having been misled by the form of the issue, has been precluded from adducing any evidence in support of it. Upon this ground I am inclined to give her an opportunity of establishing her defence, if she can. I would therefore remand the case for the adjudication of this issue, *viz.*, whether by any usage or custom prevailing amongst the caste people of the defendant there could be any valid marriage between her and Radhoo. Costs to follow the result.

(1) See 1 Mad. H. C., 478.

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MARKBY, J.—I entirely concur with my learned colleague in thinking that the lower Courts are wrong in laying down broadly and without restriction that the illegitimate sons of a sudra can succeed to the inheritance of their father. I concur with him in thinking that the illegitimate sons of a sudra can only succeed to their father's estate in certain cases; and that in this case, if the son of Radhoo be illegitimate, he will not succeed.

The only doubt I have is as to the reasons given by my learned colleague for holding that the District Judge is wrong in presuming that there was in this case a valid marriage, and that the son of Radhoo was therefore legitimate. I understand my learned colleague to consider that the presumption is excluded because the alleged wife is of a different caste from the husband, and that, unless sanctioned by custom, such a marriage is not legally binding. Upon a question of this kind I should hesitate greatly before I differed from my learned colleague, it being a question with which he is peculiarly well qualified to deal. I only wish to point out that no legal authority is quoted for this position. In the ancient text-books no such authority could be found, because it is admitted (1) that in ancient times the sudras were but one general caste or class; (2) that in ancient times the marriage of a man with a girl of a different class or caste was not prohibited. Whether the comparatively modern prohibition against intermarriage of persons of a different class or caste extends in this part of India to the modern sub-divisions of the sudra caste or class is a matter of very great importance. The restrictions thus imposed would be very numerous; and restrictions upon marriage, however convenient socially, assume quite a different aspect when recognised by the law. If the law does recognise them, of course they cannot be ignored: but if it does not, it would be wrong to impose them, and I feel great hesitation in saying for the first time that there is a legal bar to these marriages.

I do not, however, consider it necessary to express any difference of opinion upon this point, because I see no objection to the order of remand proposed by my learned colleague. If it appears upon the evidence taken that these two classes or castes

may intermarry, the presumption from cohabitation may then be made as in other cases. If, on the other hand, it be found that they cannot, there will be no room for any such presumption.

Case remanded.

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ORIGINAL CIVIL.

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Macpherson.

NOBIN CHUNDER DEY (PLAINTIFF) v. THE SECRETARY OF STATE
FOR INDIA (DEFENDANT).

1875
July 2, 5, &
13.

Right of Suit—Liability of Government—Acts done in exercise of Sovereign Powers—21 & 22 Vict., c. 106—Matter of Revenue—21 Geo. III. c. 70, s. 8.

The plaintiff, for some years before and up to 31st March, 1874, carried on the business of a retail dealer in ganja and sidhi in Calcutta, and occupied for that purpose certain shops and godowns duly licensed under the Government Regulations with respect to such sales. The license had to be renewed annually, and might, for sufficient cause, be withdrawn at any time within the year which terminated on 31st March. On 4th March, 1874, while the plaintiff was carrying on his business, the Superintendent of Excise for Calcutta put the right to sell ganja and sidhi for the year commencing the 18th April, 1874, up to public competition, which was the usual way of distributing the yearly licenses. The sale notification contained a list of the shops with the localities where they were situated, but the right was reserved in case of combination, or for other cause, to transfer, before settlement, any shop from the locality specified, to some locality in the neighbourhood; and the conditions of sale were stated to be: "that the Collector does not bind himself to accept the highest bid; that the settlement with the accepted auction-purchasers will be contingent on the approval by the Police authorities of the proposed locality of the shop, and the character of the applicant for license; that the person accepted as the auction-purchaser shall deposit at once a sum equal to the license fee payable for two months, and shall at the same time state in writing in what building his shop will be opened, it being understood that the above deposit will be returned to any person whose license is subsequently refused for Police reasons." At the sale the plaintiff was the highest bidder for the licenses for five shops for the sale of ganja and sidhi, and his bids were recorded; and he also paid the deposit due in respect of the licenses amounting to Rs. 968. Subsequently, the Excise Authorities refused licenses to the plaintiff for the five shops, and failed to return the deposit made in respect thereof. In a suit brought by the plaintiff against the Secretary of State in Council for India, in which he alleged that the Government had accepted his bid, and thereby contracted with him to give him the licenses and allow him to carry on his trade in ganja and sidhi, and

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that by their not giving him licenses, and so forcing him to close his godowns and shops, they had committed a breach of contract for which he was entitled to damages,—*Held*, on the evidence, per PHEAR, J., that there was no contract between the plaintiff and the Government. *Held* also, both in the Court below and on appeal, even assuming there was a contract, that the suit was not maintainable, being in respect of acts done by the Government in the exercise of sovereign powers. Suits such as might, previous to the passing of 21 & 22 Vict., c. 106, have been brought against the East India Company, and subsequently against the Secretary of State in Council, are limited to suits for acts done in the conduct of undertakings which might be carried on by private individuals without sovereign powers.

APPEAL from a decision of Phear, J., dated 17th April, 1875.

The facts of the case are sufficiently stated in the judgment appealed from, which was as follows :—

PHEAR, J.—In this case one Nobin Chunder Dey sues the Secretary of State for India. The cause of action is very obscurely stated in the plaint, but it seems beyond doubt that the plaintiff does not seek to make any particular person or officer of State responsible to him on any ground. His object is to establish a certain cause of complaint against the Government of the country, and to compel the Government to pay him money-compensation in respect of it out of the public revenues, if he can do so through the means of this Court.

Now, generally, it may be said that, under the English constitution, the Crown, the Government, or State cannot be sued in its own Courts; neither can any of the officers or servants of the Government be made liable for anything *bonâ fide* done by them on the part of, and as the agents of, Government. In the event of any person being aggrieved or injured by the acts or omissions of a Government servant or department, the remedy, if any there be, can only be sought by petition of right, unless the Government servant, to whose fault the grievance is attributable, so conducted himself in the matter as to render himself personally liable. And this holds true with regard to the colonies as well as with regard to the mother country.

To some extent the case is seemingly, though not essentially, different with regard to India. While the Government of this country was in the hands of the East India Company, the Company never entirely lost its private or commercial character: even

when it was directed, by 3 & 4 Will. IV, c. 85, to abstain from all commercial business, an exception was made as to such as might be carried on for the purpose of Government. It has often been ruled in the English Courts that the fact of the East India Company having been invested with powers, usually called sovereign powers, did not constitute them a sovereign—*Bank of Bengal v. East India Company* (1) and *Moodalay v. East India Company* (2); and in the case of *P. & O. Company v. The Secretary of State* (3), it was explained by the late Supreme Court that “the East India Company were not sovereigns, and therefore could not claim all the exemption of a sovereign, and that they were not the public servants of Government, and therefore did not fall under the principle of the cases with regard to the liabilities of such persons, but they were a Company to whom sovereign powers were delegated, who traded on their own account, and for their own benefit, and were engaged in transactions, partly for the purposes of Government, and partly on their own account, which without any delegation of sovereign rights, might be carried on by private individuals. There is a great and clear distinction between acts so done in the exercise of what are usually termed sovereign powers and acts done in the conduct of undertakings which might be carried on by private individuals without having such powers delegated to them.” And it was clearly pointed out by the Supreme Court, on an examination of the leading cases, that, in regard to matters and undertakings of the latter kind, the East India Company were liable to be sued, “though where an act is done or a contract entered into in the exercise of powers usually called sovereign powers, by which we mean” (the Court says) “powers which cannot be lawfully exercised except by a sovereign, or private individual delegated by a sovereign to exercise them, no action will lie.” And when, by 21 & 22 Vict., c. 106, the Government of India was transferred from the East India Company to Her Majesty, it was enacted in s. 65:—“The Secretary of State in Council shall and may sue

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(1) Bign., 120.

(2) 1 Br. Ch. Ca., 469.

(3) Bourke's Rep., Pt. vii, 166, at pp. 188, 189.

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and be sued, as well in India as in England, by the name of the Secretary of State in Council as a body corporate; and all persons and bodies politic shall and may have and take the same suits, remedies, and proceedings, legal and equitable, against the Secretary of State in Council of India as they could have done against the said Company." Hence all suits, such as might, before the passing of 21 & 22 Vict., c. 106, have been brought against the East India Company, may now be brought against the Secretary of State in Council; and these seem to be limited to suits for acts done in the conduct of undertakings which might be carried on by private individuals without sovereign powers.

If, then, the plaintiff has a cause of suit which would have been good against the East India Company before the transfer of the Government of India to the Queen, and therefore has a right to be compensated out of the public revenues of India, he ought to have designated the defendant as Secretary of State for India in Council. If his cause of suit is not of this character, then he ought to fail, for he has not attempted to make out any ground of action against the Secretary of State for India, or any specific person.

The Advocate-General does not object to the plaint being treated as a plaint presented against the Secretary of State in Council; and, therefore, the first question is, whether the cause of action on which the plaintiff sues is one which would have been good against the East India Company.

It is not very easy to make out from the plaint what precisely is the plaintiff's ground of suit. But the material facts of his case, as I understand the evidence, appear to be as follows :—The plaintiff, for several years before and up to the 31st March, 1874, pursued the occupation of a retail seller of ganja and sidhi in shops in Calcutta, licensed for that purpose by the proper Government officers, under certain Government Regulations; and he kept the ganja and sidhi in godowns also licensed by the Government. In each case it seems that the license only lasted for a year, terminating on the 31st March, and might, for sufficient cause, be withdrawn within the year. It is illegal to store for sale and to sell ganja and

sidhi elsewhere than in licensed places, and the whole system of these licenses has for its object the security of, and the greater convenience in collecting, so much of the Government revenue as arises from the license and excise duties on these articles. On the 4th March, 1874, while the plaintiff was carrying on his occupation as just mentioned, and the termination of the license year was approaching, the Superintendent of Excise for Calcutta put up for public competition the right of retail sale of, amongst other excisable articles, ganja and sidhi. This is the usual mode of distributing the yearly licenses. The sale notification stated:—"The right of retail sale of the liquors and drugs below specified up to the close of the year ending 31st March, 1875, will be put up to auction at the Calcutta Collectorate on the 2nd March, 1874, and subsequent days, in the following order. . . . A complete list of all shops for which licenses will be offered is open to general inspection at the Collectorate, and the number of these shops will, under no circumstances, be increased during the year. A list is given below of the shops of each kind to be settled with in the locality specified. The Superintendent, however, reserves to himself the right, in case of combination, or for other cause, to transfer before settlement, any shop from the locality specified to some locality in the neighbourhood. The auction will be held subject to the following conditions: (a) that the Collector does not bind himself to accept the highest bid; (b) that the settlement with the accepted auction-purchasers will be contingent on approval by the Police authorities of the proposed locality of the shop and the character of the applicant for license; (c) that the person accepted as the auction-purchaser shall deposit at once a sum equal to the license fee payable for two months, and shall, at the same time, state in writing in what building his shop will be opened, it being understood that the above deposit will be returned to any person whose license is subsequently refused for Police reasons. Should the license be granted, one-half of the deposit will be credited as fee for the first month, and the other half will be retained as security during eleven months for the continuance of the shop, being credited in the twelfth month as fee for that month."

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At this sale the plaintiff was the highest bidder for the licenses for five shops for the sale of ganja and sidhi, and his bids were recorded. He also paid the deposit due in respect of these licenses amounting to a sum of Rs. 968.

What was done subsequently to this in the matter of the license, is not made entirely clear by the evidence. But it is certain that, for reasons which it is not for the moment necessary to enter into, almost immediately afterwards, the Excise authorities refused passes to the plaintiff for the excisable articles which constituted his stock-in-trade, and so, in effect compelled him to close his godowns and shops. On this state of facts the plaintiff maintains that the Excise authorities accepted his bid, and thereby contracted on the part of the Government to give him licenses for the five shops, and to allow him to exercise his trade therein for the year commencing with the 1st of April, 1874; and that, by their not giving him these licenses, or at any rate by their forcing him to close his shops and godowns, a breach of the contract has been committed, for which he is entitled to seek compensation in the shape of damages at the hands of Government. And he estimates the damages at the large sum of Rs. 6,965, including therein money deposited by him in advance for the licenses, which he says he never got; money paid for passes of certain excisable articles, which were refused to him; outlay in the manufacture and loss on the sale, of ganja, which he had prepared in the anticipation of getting the contract of license from Government; loss on the ganja, &c., stored in his godowns; and loss of profits of his business.

If, however, the contract and breach, as the plaintiff thus puts them, be assumed, it seems to me that no action in respect of them lies against the Government. The matter involved in them is clearly, I think, not in any degree an undertaking which might be carried on by private individuals without sovereign powers. The contract was only part of the administrative contrivance and arrangement by which the Government is accustomed to collect the excise duties, and the levying of the excise duties and other portions of the public revenue certainly could not lawfully be done by private persons not

delegated by the sovereign to do so. On this ground, then, I think the plaintiff's suit must be dismissed with costs. The case of *P. Chithambaram v. The Collector of Sea Customs* (1), recently decided in the Madras High Court and referred to before me, has no bearing upon the matter. For in that case there was no question about the right to sue the Government of India. The defendant, though an officer of Government, was made personally liable to the plaintiff for conduct in his office so extravagantly *ultra vires* and tortuous that he could not be presumed to have acted *bona fide*.

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I am also of opinion that the evidence, which in many respects is very unsatisfactory and incomplete in this case, fails to establish any such contract on the part of the Government as that upon which the plaintiff relies. The acceptance of the bid (if that, in fact, took place) and the payment of the deposit money was, I think, at most a preliminary contract, by which one term of the intended principal contract was agreed upon, *viz.*, the price or license fee at which the shops, if settled at all with the plaintiff, were to be settled. In the conditions of sale it was expressly stipulated that the Superintendent of Excise reserved to himself the liberty of changing, before the settlement should be actually made, the shop (or house) in respect to which the settlement was to be made: and also that the settlement would be contingent on approval by the Police authorities of the proposed locality of the shop and the character of the applicant for license. The case of delay in effecting the settlement, caused by delay in the issue of the Police certificate, is also provided for; and one of the conditions of the sale was "that the person accepted as the auction-purchaser shall deposit at once a sum equal to the license fee, payable for two months, and shall, at the same time, state in writing in what building his shop will be opened, it being understood that the above deposit will be returned to any person to whom license is subsequently refused for Police reasons." On the whole, it seems to me that the auction license sale, under these circumstances, merely had the effect of ascertaining the principal term in the proposed settlement agreement,

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but that there was no complete contract between the Government and the auction-purchaser in the matter until the settlement of some specific house was actually effected. The proceedings, so far as they had gone, would no doubt lead the auction-purchaser to expect that the Government would, in the event of the requisite Police certificate being procured, within reasonable time settle with him for the proposed house at the auction price, unless the Excise Department should substitute another house for it. But there was no binding agreement on this point. It was not the case of an agreement for a settlement to be followed by a settlement. The proceedings were negotiatory in their character, leading up to the settlement. In the other view the plaintiff must have also, on his part, bound himself to take, instead of the house proposed by himself, any house which the Excise Superintendent might select, and this I do not think that either party contemplated.

Thus, if the action were maintainable against the Government, the main ground upon which the plaintiff bases his claim fails him; for inasmuch as, in my opinion of the facts, the Government did not contract to settle with him for the five houses, or to license his shops, he has no title to compensation for the consequences of its omitting to do so. And I may add that the greater part of the expenditure and loss which the plaintiff sought to connect with the supposed contract, and to make consequent on its breach, was not fairly attributable to it.

Besides complaining of the breach of contract which he supposes was effected by the auction-sale, and claiming compensation for the consequential loss thereby accruing to him, the plaintiff says also that the Excise authorities, by refusing to give him passes, caused a large quantity of ganja to be detained in his godowns when he desired to remove it or to sell it; and also prevented him from obtaining certain opium and sidhi, for which he had paid the duty. The facts of this part of the case are very vaguely given in the plaint, and the evidence does not make the matter clearer. So far as I can perceive, the plaintiff did eventually get the opium and sidhi for which he paid the duty, although passes for these articles were, in the first instance, refused. And no obstacle was placed in the way of his realising

the ganja which was stored in his godown at the time of his failure to obtain the retail license, other than that which was involved in the fact of his having no retail shop of his own to sell it in. But had it been otherwise on these points, the Government, for the reasons already given, could not have been made responsible in a suit for the refusal of the passes.

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The conclusion at which I have arrived on the whole of the case is shortly as follows: that this is not a suit brought against an officer of Government, or a public servant, to enforce a personal liability incurred by him by reason of his conduct in the discharge of his duty, but is a suit against the Government itself in respect to an alleged contract made, and for acts done in the exercise of sovereign powers, and is, therefore, not maintainable. If, however, it be assumed that the suit is maintainable, then I am also of opinion that the only part of the plaintiff's claim which is made out by the evidence is the claim to be repaid the amount of money deposited by him in respect of the licenses which were not furnished him. But here it is said on the part of the Government, that although the plaintiff was not, in fact, settled with in respect of the five shops in pursuance, and as the result, of the public license sale, yet he was allowed to and did carry on his trade in three of these shops from the 1st to the 15th April; and that on the 21st May the plaintiff was served with a formal notice by the Excise Superintendent, under s. 10 of Act XI of 1849, that the licenses for the shops held by him would be withdrawn at the end of a month from that date; and was at the same time informed that passes would be issued to him for the importation of excisable articles into his said shops during the said period of one month. And it is further alleged that during this month the plaintiff did, in fact, import into his shops certain specified excisable articles. On this state of facts, it is maintained on the part of Government that the Rs. 968, deposited by the plaintiff under the conditions of the auction-sale of 4th March (and no other deposit is admitted), were applicable, in the first place, to discharge license fees due from the plaintiff to the Government for his shops (on what footing is not said) for the period of a month, from 21st May to 21st June, amounting to

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Rs. 484, and that the remainder only, *viz.*, Rs. 484, was really due from the Government to the plaintiff. * * * *

The result of the evidence, on the whole, is, in my opinion, supposing the suit to be one maintainable against the Government, that the plaintiff ought to be repaid the money which he deposited as an advance for license fees, but that, he has totally failed to make out any ground upon which he could claim damages from the Government. I have already said that in the view I have taken, I must dismiss this suit with costs, but I thought it right to give the conclusion at which I have arrived upon the evidence before the Court. The Government was, no doubt, rightly advised to meet this suit in every possible way: but I should suppose that, if the facts of the case are such as they have been made to appear to me by the evidence, the plaintiff would recover back his deposit money on making a proper petition for that purpose to the Government of India,—a petition which, if not, strictly speaking, a petition of right, would be of the nature of a petition of right. It probably is the case that persons with whom the Excise authorities have to deal in matters of this kind are not over-scrupulous, and that the Government has always to be watchful, lest it be defrauded by smuggling practices, such as those which have been attributed to the plaintiff in this suit. But to keep money, which the Excise authorities themselves had invited the plaintiff to place in their hands on the faith of getting licenses, against an old claim for unpaid revenue, such as that which has been set up in this case, savours itself, I think, if I may venture to say so, somewhat of that very unscrupulousness against which the Excise authorities have to guard. The plaintiff ought, at least, to have been warned before he deposited his money that he was doing it at his own risk, because the Government intended to exercise pressure to keep it against the Burranagore claim; and I feel sure the authorities could never have intended to take up a course of this kind. I need hardly add that I may be-mistaken with regard to the true facts of the case. I can only judge by the evidence which has been put before me, and that evidence is very meagre and unsatisfactory on both sides.

The suit must be dismissed with costs on scale No. 2.

From this decision the plaintiff appealed.

Mr. *Wood* for the appellant.

The *Advocate-General*, offg. (Mr. *Paul*) and the *Standing Counsel*, offg. (Mr. *Phillips*) for the respondent.

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Mr. *Wood* contended that the suit was maintainable against the Government. It was brought in respect of matters for which a claim could have been enforced against the East India Company before the passing of 21 & 22 Vict., c. 106. S. 65 of that Act provides that all such remedies and proceedings as any person might have against the Company might be enforced and taken against the Secretary of State for India in Council, and he was liable to be sued in the same manner as the East India Company. By virtue of 53 Geo. III, c. 155, ss. 35, 59, and 60, read in connexion with 3 & 4 Will. IV, c. 85, ss. 2, 9, and 10, the East India Company was directly interested in the territorial revenue of India, and by s. 59 of the former Statute were liable out of the capital stock and assets of the Company to satisfy any judgment that might be obtained against them. The causes of action in this suit were for debt and liabilities lawfully incurred under a contract made with the officers of Government, for which a suit could have been maintained against the East India Company under the above Statutes.

This was not a matter of revenue, nor an act done in the exercise of sovereign power; it was in the nature of a contract made with the Government as having a trading monopoly in opium; and the plaintiff says, the defendant, representing the Government, has committed a breach of the contract by not giving him the license; see *P. Chithambaram v. The Collector of Sea Customs* (1), where it was held that the Letters Patent of the Madras High Court did not preclude such an action being brought. The provision of 21 Geo. III, c. 70, s. 8, taking away the jurisdiction of the Supreme Court in matters of revenue, was virtually repealed by 53 Geo. III, c. 155, ss. 98

(1) 10 Mad. Jur., 94.

1875 and 99, which Statute was confirmed by 3 & 4 Will. IV, c. 85, s. 10. [The Advocate-General.—Ss. 98 and 99 of the former Statute are repealed by Act XIV of 1870.] Act XIV of 1870 contains a provision that the Act shall not affect any principle or rule of law, or established jurisdiction, or custom, notwithstanding it may be affirmed or recognised by any enactment by the Act repealed; so that the rule of law laid down in cases decided on these sections, 98 and 99, would not be affected, and would still apply. It is submitted moreover that they are re-enacted by 3 & 4 Will. IV, c. 85, ss. 9 & 10, and those sections have not been repealed; see the cases of *Moodalay v. Morton* (1) and *Ramchund Ursamul v. Glass* (2). The former case was a suit filed by a person who had been dispossessed by the Company of a lease granted to him to supply Madras with tobacco; and a demurrer to the bill was overruled. The second case was one of trespass for the seizure of opium, and the plea was taken that the Supreme Court had no jurisdiction as the matter related to revenue, but it was overruled; and it was said the Court had jurisdiction generally under 53 Geo. III, c. 155, s. 98, for illegal acts committed under revenue regulations at the Presidency.

This is not a revenue matter within the meaning of 21 Geo. III, c. 70, s. 8, so as to take away the jurisdiction of this Court to maintain the suit. The connexion of the matter with the revenue must be immediate—*Vencata Runga Pillay v. East India Company* (3). [GARTH, C. J.—Can you say the money which was the actual fee for the license was not part of the revenue? It was paid and received as an excise fee.] It would not become revenue until the license was granted; it was merely a deposit of money for a certain purpose, which was never fulfilled: the license never having been granted, the money never became part of the revenue. The grant of the license was a condition precedent to the deposit becoming the fee for it: the Collector being merely in the position of a stake-holder until an event should happen, which never did happen. It is submitted further

(1) 1 Br. Ch. Ca., 469.

(2) Per. Or. Cas., 360.

(3) 1 Mad. Notes of Cas., 153.

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that the word "revenue" in 21 Geo. III, c. 70, s. 8, means only land revenue. In *Ramchund Ursamul v. Glass* (1), it is said that 53 Geo. III, c. 155, was the first Statute which made provision with respect to customs duties. In the case of *Audhur Chandra Shaw* 2), which was an application for a mandamus to compel the Board of Revenue to pass rules relating to license fees, the Court refused the application on other grounds than that of want of jurisdiction; see also *Government of Bombay v. Desai Kullianrai Hakoomutrai* (3). [GARTH, C. J.—The point was not taken in that case.] It might have been taken and was not. There is nothing whatever to entitle the Government to retain the money.

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In the *P. & O. Company v. The Secretary of State for India in Council* (4), the plaintiffs were held entitled to recover against the Government damages sustained in consequence of the negligence of workmen employed by the Government. [MACPHERSON, J.—That decision avoids the point now in question. It is expressly limited by the case stated to cases where the Government is acting as any private individual might act; see pp. 172, 173.] That case shows that it is not a matter of revenue merely because any damages which might be recovered would have to be paid out of the revenues of India. That case too distinguishes the case of *Lane v. Cotton* (5), where it was held that a public officer is not responsible for the default of servants under him. Here the plaintiff has no remedy except this action; there is nothing here in the nature of a proceeding by petition of right as might be taken in England.

Counsel for the respondent were not called upon.

The judgment of the Court was delivered by

GARTH, C. J.—This was a suit brought by the plaintiff, who, for some years previously to March, 1874, appears to have been a retail dealer in sidhi and other excisable articles at Calcutta, against the Secretary of State for India in Council; and the

(1) Per. Or. Cas., 360.

(4) Bourke's Rep., Pt. vii, 166.

(2) 11 B. L. R., 250.

(5) 1 Lord Raym., 646.

(3) 14 Moore's I. A., 551.

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object of the suit was to establish certain claims against the Government of India, the nature of which was not very clearly defined either in the plaintiff's statement or in the evidence.

It is unnecessary, however, in the view which we have taken of the case, to enter into all the circumstances, which have been so carefully considered and commented on by the learned Judge in the Court below. Suffice it to say that, in substance, the plaintiff puts his claim in this way: He says—At the public auction, which was held by the Government officer on the 4th of March, 1874, of licenses to sell certain excisable liquors and drugs, I became the highest bidder for the right to sell such liquors and drugs at five different shops at Calcutta; I paid the deposits upon my purchase, and did all that was necessary to entitle me to the licenses. I demanded these licenses from the Government officials, and I failed to obtain them. Furthermore, I paid the duties upon certain excisable articles of the same character which I kept in my godowns; but, notwithstanding this payment, I could not obtain from the Government officers the necessary papers to enable me to obtain these articles. The consequence was, that I was obliged to close my shops. I sustained heavy damages upon the resale of goods, as well as in other ways, entirely through the wrongful acts and default of the Excise officials; and I am therefore entitled in the first place to be compensated for all the damages which I have thus sustained, or, failing that, I am at least entitled to have the deposit which I paid on the purchase of the licenses returned to me.

This being the nature of the plaintiff's claim, the first and main question which arises, and the only one which it is really necessary for us to decide, is, is this a claim which, even assuming the plaintiff to be right upon the merits, he can legally enforce by suit against the Government of India? Because when he sues the Secretary of State for India in Council, he sues him of course as representing the Government. He relies for that purpose upon the provisions of the Act which has been so frequently referred to, the 21 & 22 Vict., c. 103, under which the possession and government of the British territories in India were transferred from the East India Company to the Crown; by the 65th section of which Statute it was provided that the

Secretary of State in Council might be sued as a body corporate, and that all persons might have and take the same remedies and proceedings against him in that capacity, as they might have had and taken before the Act passed against the East India Company. Then comes the question, whether taking the plaintiff's claim to be as he states it himself, was it, or was it not, such a claim as could have been enforced before the Act against the East India Company? In order to decide this question, it will suffice to refer to one authority, upon which the learned counsel for the plaintiff mainly relied in his argument, and which explains and distinguishes in the clearest manner those claims which could and those which could not have been enforced against the East India Company before the Act. I allude to the case of the *P. & O. Company v. The Secretary of State for India in Council* (1).

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It was a suit brought by the plaintiffs for damage done to one of their horses through the negligence of some men employed at one of the Government dockyards, which dockyard was carried on by the Government in the same way, and for the same purposes, as any private firm or company might have carried on a similar business. It was tried by Macpherson J., sitting at that time as the First Judge of the Small Cause Court, and the question of the defendant's liability was referred by him to the Supreme Court as a point of law. The case was heard by Sir Barnes Peacock and two other Judges of the Supreme Court, and resulted in a most learned and elaborate judgment, in which, after going very fully into the provisions of the Statute, and examining all the authorities with great care, the Court decided that the Government of India were responsible to the plaintiffs in that suit upon the express ground that the negligence complained of was an act done by their servants in carrying on the ordinary business of ship-builders (unconnected altogether with the exercise of sovereign powers), and which any firm or individual might have carried on for the same purposes.

It was held that, because the East India Company would have been liable in such a case before the Act, the Government

(1) Bourke's Rep., Pt. vii, 167.

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of India was equally liable after the Act came into operation; and the distinction was very carefully drawn between acts done by the East India Company in their private capacity and acts done by them in the exercise of those sovereign powers which were entrusted to them by the Crown for purposes of government. "There is a great and clear distinction" (says Sir Barnes Peacock) "between acts done in the exercise of what are usually termed sovereign powers and acts done in the conduct of undertakings which might be carried on by private individuals without having such powers delegated to them" (he cites *Moodalay v. The East India Company* and *Moodalay v. Morton* (1) relied on by Mr. Wood, and Lord Kenyon's observations upon that case), and then Sir Barnes Peacock goes on to say: "But where an act is done or a contract entered into in the exercise of powers usually called sovereign powers, by which we mean powers which cannot be lawfully exercised except by a sovereign or private individual delegated by a sovereign to exercise them, no action will lie."

Bearing in mind this very important principle, with which we entirely agree, let us see whether the claim of the plaintiff is one which could possibly be enforced against the Government of India.

The persons who are said to have been guilty of the acts and default of which he complains, are the officers employed in that department of the Government service which relates to the imposition and collection of the excise duties. The ground of the complaint is, that those officers have been guilty of various breaches of duty in not fulfilling obligations to the plaintiff which they were bound to fulfil in that capacity.

Now it is impossible to doubt for a moment that the laws which are made in this or any other country for the taxation of the subject by the imposition of customs and duties, are laws which can only be made or enforced in the exercise of sovereign powers properly so called; and these sales, at which the plaintiff contends that he purchased the rights on which he claims, only constitute a portion of the machinery and arrangements by which the imposition and collection of the excise duties are regulated in

this country. His claim is therefore clearly one of those which cannot be enforced against the Government of India. In this view of the case, it is unnecessary to enter into the consideration of several other points which were pressed upon us by Mr. Wood in the course of his argument; as for instance, whether the word "revenue" as used in particular Acts meant merely land revenue, or was used in a more extended sense; whether the cross-claim that was made against the plaintiff by the Government officers was or was not well-founded; and generally whether, assuming the plaintiff to have been in a position to sue, he would have been entitled to enforce his claim upon the merits.

We decide this case upon the broad and intelligible ground which I have already mentioned, and which was very clearly explained by Phear, J., in the Court below.

The appeal will be dismissed with costs on scale No. 2.

Appeal dismissed.

Attorney for the appellant: Mr. W. Linton.

Attorney for the defendant: The Government Solicitor, Mr. Sanderson.

FULL BENCH RULING.

Before Mr. Justice Macpherson, Officiating Chief Justice, Mr. Justice Jackson, Mr. Justice Pontifex, Mr. Justice Birch, and Mr. Justice Morris.

RAJKISHORE LAHOORY (DEFENDANT) v. GOBIND CHUNDER LAHOORY (PLAINTIFF).

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RAMMONEY DOSSEE AND ANOTHER (DEFENDANTS) v. GOBIND CHUNDER LAHOORY (PLAINTIFF).*

Hindu Law—Inheritance—Brothers of the whole blood and of the half blood

By the Hindu law current in Bengal, a brother of the whole blood succeeds in the case of an undivided immoveable estate in preference to a brother of the half blood.

* Regular Appeals, Nos. 241 and 265 of 1873, against a decree of the First Subordinate Judge of Hooghly, dated the 7th July, 1873.

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THE plaintiff in this case, claiming to be sole heir of his deceased uterine brother Bhagwan Chunder Lahoor, sued to recover the latter's estate. The defendants were the plaintiff's half-brother, Rajkishore Lahoor, and two ladies, named Hurro Soondery and Luckhinarainee Dossee, who had purchased a portion of the property from Rajkishore.

The plaintiff alleged that his father died leaving the defendant Rajkishore, the deceased Bhagwan Chunder, Gopal Chunder, a grandson by another son, and the plaintiff his heirs; that Bhagwan Chunder, Gopal Chunder, and the plaintiff were then minors, and that his father's estate came into the hands of Rajkishore, with whom they lived in commensality; that Bhagwan Chunder died unmarried; that after his death, namely in 1270, the plaintiff and Rajkishore separated, and that Rajkishore gave the plaintiff a list of the properties belonging to the joint estate, and at the same time persuaded the plaintiff that he was entitled only to a moiety of Bhagwan Chunder's share; and that he had since discovered that Rajkishore, while in possession of the joint estate as kurta, had purchased with the joint funds certain properties not included in the list.

The defendant Rajkishore, in his written statement, alleged that the plaintiff separated from him on coming of age and received a 6-anna share of all joint and ancestral property; and that on 22nd Pous, 1270 (5th January, 1864), he executed an ikrarnama relinquishing all further claims against Rajkishore in respect of these properties. He also stated that the purchased properties mentioned by the plaintiff were purchased by himself with his own funds.

The defendants Hurro Soondery and Luckhinarainee contended that Rajkishore was exclusively in possession at the time they purchased, and that they had been in possession for twelve years since their purchase.

The subordinate Judge found that the properties claimed by the plaintiff as having been purchased with joint funds had been purchased by Rajkishore while he was manager and guardian, and that he had not proved that he had purchased them with his own money. He was also of opinion that the ikrarnama, by which the plaintiff had agreed to take 6 annas instead of

8 annas of the whole property as his proper share, was not binding on him, as it was executed immediately before or after attaining his majority. He further found that Hurro Soondery and Luckhinarinee knew Rajkishore was a member of a joint family, and that they were not *bond fide* purchasers without notice. He accordingly decreed the plaintiff's claim.

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Separate appeals were preferred from this decision by Rajkishore and the representatives of the purchasers. These appeals were heard together before Jackson and McDonell, JJ. It was contended on behalf of the defendant Rajkishore, that the plaintiff was not entitled to the share of his deceased uterine brother to the exclusion of Rajkishore the half-brother, as the family and estate were undivided at the time of Bhagwan Chunder's death. This question was referred to a Full Bench with the following remarks :—

JACKSON, J. (after shortly stating and confirming the judgment of the Court below on the facts, continued).—There remains the point of Hindu law whether plaintiff is entitled solely to succeed to the share of his uterine brother, or whether Rajkishore, being a brother of the half blood, should succeed jointly and equally with him. On the side of the defendant there are several cases—*Tiluck Chunder Roy v. Ram Luckhee Dossee* (1), *Kylas Chunder Sircar v. Gooroo Churn Sircar* (2) and *Shib Narain Bose v. Ram Nidhee Bose* (3)—in all of which it has been held on the authority of my colleagues, Kemp and Glover, JJ., and the late Elphinstone Jackson, J., that in the case of undivided immoveable property all brothers, whether of the whole blood or half blood, succeed alike. Some of the decisions referred to go even further. We are, as at present advised, unable fully to concur in this view of the Hindu law. The Dayakrama Sangraha, Chap. i, s. 7, vv. 1 to 5, appears unequivocally to favour the contention of the plaintiff. Cl. 5 is to the effect that, "where uterine and half-brothers compete, and both were associated with the deceased, the associated whole brother exclusively takes the inheritance, for in this

(1) 2 W. R., 41.

(3) 9 W. R., 87.

(2) 3 W. R., 43.

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case he possesses a double title (namely, his being uterine and also associated) in conformity with the text," which follows. Then in the *Dayatatwa* of Raghu Nandana, Chap. xi, para. 30 (p. 67), the prior claim of the uterine brother is unequivocally stated, and the ground of it is also stated, *viz.*, that, whereas the former, that is the uterine brother, offers oblation cakes to six ancestors, the latter, that is the half-brother, only offers to three. On the other side it is contended that the *Dayabhaga* is in favour of the defendant. Chap. xi, s. 5, paras. 34, 35, and 36 (these sections apparently qualify the dicta in vv. 9 and 10), is referred to. V. 35 says:—"This rule shall hold good in regard to the immoveable estate. This rule is relative to divided immoveables. For, immediately after treating of such property, Yama says,—'The whole of the undivided immoveable estate appertains to all the brethren; but divided immoveables must on no account be taken by the half-brother.'" A good deal of light is thrown upon this passage by the comment in *Colebrooke's Digest*, Vol. iv of the Calcutta edition of 1798, p. 218, text 431. The author of the *Digest* there, after setting out the text of Yama, which is referred to in the *Dayabhaga*, says—"If any immoveable property of divided heirs, common to brothers by different mothers, have remained undivided, being held in coparcenary, the half-brothers shall have equal shares with the rest, but the uterine brother has the sole right to divided property, moveable or immoveable." Our attention is drawn to this by a note in *Baboo Shama Churn Sircar's Vyavastha Darpana*, 2nd edit., p. 1057, in which, commenting upon the decision in *Tiluck Chunder Roy v. Ram Luckhee Dossee* (1), he adverts to the interpretation in *Colebrooke's Digest*, and indicates his opinion that the text in question and the note upon it seem to establish the position, that where brothers being divided as to a greater or less portion of their estate leave a certain portion in joint possession,—that is to say, where such portion has remained undivided, then by the intention and consent of the brothers that undivided portion is subject to the succession of all the brothers, whether of uterine or of half blood, but that

(1) 2 W. R., 41.

the text in question does not imply a right of brothers of the half blood to share equally with uterine brothers, where the whole estate has been undivided. We observe that the view of the Hindu law on this point, which is thus suggested, and which is founded on the Dayakrama Sangraha and the Dayatatwa, is that adopted by Mr. Cowell in his lectures on the Hindu Law—Lectures of 1871, pp. 141 and 142. Being therefore doubtful whether the rulings on this point which are cited can be supported, we think that the matter, which is one of considerable importance to the Hindu community, ought to be decided by a Full Bench of this Court.

Baboo *Hem Chunder Banerjee* for the appellants.—By the Hindu law the half-brother and the whole brother succeed together. This is the effect of vv. 34 to 38 of Chap. xi, s. 5, of the Dayabhaga read together. The Dayatatwa of Raghu Nandana is not a work of great authority, and where it is opposed to the Dayabhaga, the latter must be preferred. It is submitted, however, that on the present question there is no conflict between the two works. The passage from the Dayatatwa referred to by Jackson, J. (Chap. xi, v. 30), is as follows:—"Hence of a uterine brother and one born of the step-mother, though they are sprung from the same father, the uterine brother alone succeeds, but not the step-brother; because the former presents oblations to six ancestors, which the deceased was bound to offer, but the latter offer oblations to the three paternal ancestors only." But this refers to the class of cases contemplated in v. 34, as appears from v. 37, which says:—"Undivided immoveable property goes to all (brothers). But never should separated immoveable estate be taken by half-brothers. 'All,' that is, all the whole and half-brothers." See also vv. 54, 55, and 56. The Dayakrama Sangraha, no doubt, supports the contention of the other side; see Chap. i, s. 7: but the author does not consider the text of Yama, that undivided immoveable property goes to all the brothers of the whole as well as of the half blood. Baboo Shama Churn Sircar in his *Vyavastha Darpana* (2nd edit.), p. 203, says:—"If there be no uterine brother, the half-

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brothers are entitled to inherit. But the whole and half-brothers are equally entitled to an undivided immoveable estate." In a note on p. 1057 he draws a distinction between the case of the whole property being undivided and the case where a portion has been divided and a portion left undivided, and goes on to state that the Dayabhaga says nothing about the divided and undivided estate: but in this he is wrong. Mr. Cowell, in his Lectures on Hindu Law, 1871, at p. 143, says:—"When however the brethren hold undivided immoveable estate, in that case, on the death of one of them without nearer heirs, the others divide his share irrespective of difference of blood;" and he cites the text of Yama, on which the decision in *Tiluck Chunder Roy v. Ram Lukhee Dossee* (1) is based. The law, as far as the decided cases are concerned, is in my favour. Besides the case just cited there are the two others—*Kylash Chunder Sircar v. Gooroo Churn Sircar* (2) and *Shib Narain Bose v. Ram Nidhee Bose* (3). The first two cases cited are based upon 2 Macnaghten's Hindu Law, p. 66.

Baboo Bama Churn Banerjee for the respondent.—The question has been complicated only by the text of Yama. The rules of inheritance are founded upon considerations of spiritual benefit conferred upon the deceased by the offering of oblations—*Guru Gobind Shahu Mandal v. Anand Lal Ghose Mazumdar* (4). The brother of the whole blood offers three cakes to the ancestors of the deceased on the father's side, and three on the mother's, whereas the brother of the half blood offers three cakes to the paternal ancestors only, his brother being of a different family; see the Dayabhaga, Chap. xi, s. 5, v. 12. V. 9 says—that if there be no brother of the whole blood, then the half-brother takes. A distinction is made in cases of a reunion of the brothers. The reason of that is that the authors are partial to a reunion. The Dayakrama Sangraha, Chap. i, s. 7, v. 1, says—"On failure of the mother, the succession goes to the uterine or whole brother, who offers three funeral oblations to the father,

(1) 2 W. R., 41.

(2) 3 W. R., 43.

(3) 9 W. R., 87.

(4) 5 B. L. R., 15.

grandfather, and great-grandfather of the deceased owner in which he participates ;” and the 2nd verse goes on—“ If there be no uterine or whole brother, the half-brothers of the same class with the deceased are entitled,” &c. According to the Dayatatwa also the whole brother is preferred to the half-brother, and for the same reason, *viz.*, that he offers six oblations, while the latter offers only three.

The names of the parties to the case in 2 Macnaghten, p. 66, upon which the cases of *Tiluck Chunder Roy v. Ram Luckhee Dossee* (1) and *Kylash Chunder Sircar v. Gooroo Churn Sircar* (2) are based, are not given. Shama Churn says, it was an up-country case, and if so, it must have been under the Mitakshara law ; see the note at p. 1057 of the Vyavastha Darpana.

Baboo *Hem Chunder Banerjee* in reply.—The principle of spiritual benefit conferred may be adopted as a guide when the text writers do not name the persons entitled to succeed, but not when the heirs are named.

Cur. adv. vult.

The opinion of the Full Bench was delivered by

MACPHERSON, J.—The answer to this question depends upon the construction to be put on the Dayabhaga of Jimutavahana, the founder of the Bengal school. The other authorities current in Bengal are all of them based on the Dayabhaga, and such differences as exist between them and the Dayabhaga scarcely ever involve conflicts of principle. According to the Dayabhaga, the whole theory of inheritance is founded on the principle of spiritual benefit conferred : and it is by that principle that questions relating to inheritance must be tested and determined (see the judgment of the Full Bench in *Guru Gobind Shaha Mandal v. Anand Lal Ghose Mazumdar* (3), the question now before us being no exception to this general rule.

It appears to me that the Dayabhaga (with the exception of one clause, Chap. xi, s. 5, cl. 35, to which I shall presently

(1) 2 W. R., 41.

(2) 3 W. R., 43.

(3) 5 B. L. R., 15.

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refer at length) clearly shows that, where there has been no separation, uterine brothers take to the exclusion of half-brothers. The difficulty which has been felt has arisen out of this cl. 35, and an erroneous idea that it and certain other propositions laid down as applicable to brothers in cases where there has been a partial partition, or a separation and subsequent reunion, are applicable to cases in which there has been no partition.

There is no possible question as to the superiority of the whole brother over the half-brother as regards conferring spiritual benefits. For, whereas the whole brother presents six oblations to the ancestors of the deceased (three on the father's side, and three on the mother's side), the half-brother presents three only, *viz.*, three on the father's side; see Dayabhaga, Chap. xi, s. 5, cls. 3 and 12. So far therefore as concerns the principle which is the foundation of the whole law of inheritance in Bengal, the brother of the whole blood must inherit in preference to the brother of the half blood.

The rights of brothers as regards successions are discussed and declared in the Dayabhaga, Chap. xi, s. 5. Much that is to be found in this section is merely vague discussion. But it is generally easy to say what is authoritative, and what is not; and the whole section (excluding cl. 35, which is reserved for special consideration) may be summed up thus: Cls. 1 to 8 show that, failing the mother, brothers inherit to the exclusion of brothers' sons (owing to the inferiority of the latter in the matter of oblations); in cls. 9, 11, and 12, it is laid down broadly that the brother of the whole blood takes before the brother of the half blood—the latter being expressly placed (s. 12) between the whole brother and the nephew or brother's son: and the rest of the section, cls. 10 and 13 to 39 (with the possible exception of cl. 35) are devoted to an argument as to what happens where there have been partition and reunion, whole or partial. From cl. 13 to the end there is not a word (unless in cl. 35) which touches a simple case of succession where there never has been a partition at all. The conclusion arrived at as the result of the discussion as to what is to happen where there have been partition and subsequent

reunion, &c., is, that if there has been a partition, and there are whole brothers and half-brothers, the whole brothers take alone if there has been no reunion: but a half-brother, who has become reunited with the deceased, will share equally with a whole brother of the deceased, who has not become reunited. The reunion in fact is considered as advancing the half-brother to a position better than that which he would otherwise have occupied, the reunion being treated as equal to blood—a result which of itself shows that the original position of the half-brother was, according to Hindu law, inferior to that of the whole brother.

Besides, the distinct declarations contained in this s. 5, there are indications in other parts of the Dayabhaga of the writer's opinion that the brother of the whole blood was superior to him of the half-blood. For example, in Chap. xi, s. 1, which treats of "the widow's right of succession," uterine brothers are mentioned in cls. 2 and 3 as near heirs: and in cl. 17 a text of Devala is quoted, which expressly gives priority to the whole brother over the half-brother. The matter there under discussion is the position of the widow, and the brothers are only incidentally named. But in the discussion it never seems to have occurred to the commentator that there was anything unnatural or wrong in classing the half-brother separately from and after him of the whole blood; while in cls. 2 and 3 the use of the word "uterine" indicates the existence of some distinction between those who were uterine and those who were not.

The Dayabhaga, Chap. xi, s. 6, deals with the "nephew's right of succession." Here it is expressly and unequivocally laid down that the succession devolves first on the son of the whole brother, and if there be none, on the son of the half-brother. And the intelligible and natural reason given is that the son of the half-brother, being a giver of oblations to the father of the late proprietor, together with his own grandmother (to the exclusion of the mother of the deceased proprietor), is inferior to the son of the whole brother, who gives oblations to the grandfather in conjunction with the mother of the deceased (cl. 2).

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We thus have it that—

(a) applying the principle which is the basis of the whole scheme of inheritance propounded in the Dayabhaga, the whole brother undoubtedly succeeds in preference to the half-brother:

(b) in the Dayabhaga, s. 5, cls. 9, 11, and 12, it is expressly said that the whole brother succeeds before the half-brother; and elsewhere there are indications that the commentator accepted as a fact the superiority of the whole blood:

(c) the son of a whole brother is expressly declared to rank before the son of a half-brother; and the principle upon which this is declared applies equally to the case of brothers and half-brothers:

(d) when there has been a separation, a half-brother, who becomes reunited, gains by the reunion a better position than he otherwise would have had, and is brought up to the level of a whole brother who has not become reunited,—which proves that the original position of the half-brother was inferior to that of the whole.

There remains cl. 35, and the difficulties which it creates. After much discussion as to separation and reunion, &c., it is said in cl. 34:—"Therefore, if whole brothers and half-brothers only (not reunited brothers of either description) be the claimants, the succession devolves exclusively on the whole brothers. Accordingly, Vrihat Menu says:—"If a son of the same mother survive, the son of her rival shall not take her wealth. This rule shall hold good in regard to the immoveable estate. But on failure of heirs, the half-brother may take the heritage." Then comes cl. 35, where, with reference to the declaration just quoted, "this rule shall hold good in regard to the immoveable estate," it is remarked:—"This rule is relative to divided immoveables. For, immediately after treating of such property, Yama says:—"The whole of the undivided immoveable estate appertains to all the brethren: but divided immoveables must on no account be taken by the half-brother.'" In cl. 36 the commentator proceeds to analyse this text of Yama, thus:—"All the brethren,' whether of the whole or of the half-blood. But among whole brothers, if one be reunited after separation, the estate belongs to him. If an unassociated whole

brother and reunited half-brother exist, it devolves on both of them. If there be only half-brothers, &c." It is to be observed,—and I think it is shown by cl. 36 that this is so,—that in the Dayabhaga itself this text of Yama is introduced only as being connected with the matter under discussion, *viz.*, the succession in cases of separation with or without reunion, &c., and there really is nothing to lead to the supposition that it was referred to save as bearing on that matter, or that in quoting it in cl. 35 there was any intention of contradicting or throwing doubt on the law as already distinctly propounded by the writer himself in the earlier portion of s. 5.

In the Dayatatwa of Raghu Nandana (written in the beginning of the sixteenth century), which is based on and closely follows the Dayabhaga, it is laid down expressly (Chap. xi, cls. 29 and 30) that the brother of the whole blood takes before him of the half. The commentator then proceeds in cls. 31 to 56 to treat of what occurs in cases of partition and reunions, &c. In the course of this discussion he brings in the text of Yama (very much as it is brought in the Dayabhaga) in connexion with Yajnavalkya's observation (set out in cl. 32) that "1, A reunited brother shall keep the share of his co-heir who is deceased; or shall deliver it to his issue. But a uterine brother shall thus retain or deliver the allotment of his uterine brother. 2, A half-brother, however, being again associated, may take the heritage: not a half-brother (who is not reunited) or (a uterine brother), though not associated, may obtain the property, and not the son of a different mother who is reunited." Discussing this clause (which I give at length merely to show how entirely it referred to cases of separation and reunion, &c.) in cls. 33 to 35, he in cl. 36 says:—"The passage 'but a uterine brother shall thus retain or deliver the allotment of his uterine brother' (s. 32) is to be explained in the same way:" then he continues in cl. 37:—"On this a special rule is propounded by Yama:—'Undivided immoveable property goes to all (the brothers). But never should separated immoveable estate be taken by half-brothers.' 'All,' that is, all the whole and half-brothers. The inference which is deduced from the sense of this text is that, exclusive of immoveable

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property, everything, whether divided or undivided, appertains to the uterine brother alone." Then cl. 38 deals with a question of reunion.

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So that here, as in the Dayabhaga itself, the text of Yama is introduced only incidentally in the course of a discussion as to cases where there has been a separation, &c.

It is not easy now to interpret a text like this of Yama standing by itself and apart from the context in which it was originally placed by its author. What that context was, we do not know. Very likely, the text never was intended to mean more than that the estate of a father dying joint with his sons goes among all the sons equally, but that, after his death, on the death of a son, the son's uterine brother succeeds in preference to his half-brother. It is impossible, however, to say for certain what the text meant.

It is quoted in Colebrooke's Digest, Bk. v, Chap. viii, s. 1, text 431. It is there treated not as laying down any general rule as regards succession, but as applying only to cases where there has been a separation between the brothers, but part of the joint property has remained undivided. It is interpreted thus by Jagannatha:—"If any immoveable property of divided heirs, common to brothers by different mothers, have remained undivided, being held in coparcenary, the half-brothers shall have equal shares with the rest, but the uterine brother has the sole right to divided property, moveable or immoveable. The text of Virhat Menu (that quoted in Dayabhaga, Chap. xi, s. 5, cl. 34) likewise intimates the same by alluding to a distinction in respect of immoveable property when the subject proposed was already ascertained by the former part of the text 428." The text referred to is as follows:—"If a brother by the same mother be living, one by a different mother shall not take the estate: the law is the same, even though it be immoveable property: but on failure of the whole blood, one of the half blood may indeed possess the estate." It is to be noted further that this text from Virhat Menu is also treated in Colebrooke's Digest as relating to the subject of succession in cases of separation, reunion, &c.

Although cl. 35 of s. 5 of Chap. xi of the Dayabhaga

may in words appear to confine the rule, as to the whole blood succeeding in preference to the half, to cases of succession "to divided immoveables," it is quite clear to me that the restriction thus put upon the rule was not intended to be general, but was confined to the branch of the subject under discussion, *viz.*, cases where there had been separation, total or partial, and with or without reunion. Were I of a different opinion, I should still not be prepared simply on account of cl. 35 to restrict the rule as suggested; for so to restrict it is directly opposed to the main principle of the Bengal scheme of inheritance, and to the express declarations of the writer of the Dayabhaga himself, and of Raghu Nandana. Yama, moreover, is not a lawgiver of very special authority, though no doubt he is one of the early propounders of the law whose rules are to be accepted when they are certain and intelligible, and not opposed to those laid down by other sages of equal or greater authority. As a matter of fact, the rule laid down in cl. 35, s. 5, Chap. xi of the Dayabhaga has never, so far as I can ascertain, been accepted (unless it can be said to be so accepted in the Dayatatwa) as laying down that in the succession to an undivided estate, the whole brother does not take before the half, until the decisions of Division Benches of this Court which have led to the present reference.

Srikrishna Tarkalankar (who lived about 1700, and whose opinion is entitled to very great respect) construed the Dayabhaga as laying down that the whole brother succeeded, when there had been no partition, in preference to the half-brother: see his recapitulations of the order of succession (Stokes' edition of the Dayabhaga, p. 352), where he sums up the law as laid down in the Dayabhaga, thus:—"If the mother be deceased, a brother is the successor. In the first place the uterine or whole brother; if there be none, a half-brother. But if the deceased lived in renewed coparcenary with a brother, then in case of all being of the same blood, the associated whole brother is heir in the first instance; but on failure of him, the unassociated brother. So in the case of all being of the half blood, the associated half-brother inherits in the first place, and on failure of him, the unassociated half-brother. But if there be an

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The same view is propounded by him in his *Dayakrama Sangraha*, Chap. i, s. 7, cls. 1 to 6: and it seems clear that Srikrishna, in laying down the law as he did, had no intention of departing in any way from the *Dayabhaga*.

To turn to more recent writers on the subject. In Halhed's "*Gentoo Laws*," published in 1776, Srikrishna is followed implicitly. I do not refer to Halhed's treatise as deeming it of much authority, but merely as showing what was in fact supposed to be the construction of the Hindu law on the question now before us.

Sir Francis Macnaghten, in his "*considerations of the Hindu Law*," published in 1824 (pp. 111, &c.), also follows Srikrishna. Referring to the question of separation and reunion and the confession existing in the texts on the subject, he remarks that it is certain that if all continue joint from the beginning, or if all are in an actual state of separation, or if all return to union after having once been separated, the uterine excludes the half-brother from the succession.

So Sir William Macnaghten, in his "*Hindu Law*" (Ed. 1828, Vol. I, p. 26), lays it down quite distinctly that "after the mother brothers inherit; first the uterine associated brethren; next the unassociated brethren of the whole blood; thirdly, the associated brethren of the half-blood; and fourthly, the unassociated brethren of the half-blood"

Elberling adopts the same opinion (para. 175, p. 78).

In the second volume of Macnaghten, at page 66, there is a case which has been referred to as contradicting Macnaghten's own text. But so far as concerns the first of the two questions, which are supposed to be dealt with in that case, it turns upon a wholly different point, *viz.*, that when the first of the three brothers (one of whom was of the half-blood) died his share went by survivorship to the other brothers, to the exclusion of his widow. This shows that the case must have been one under the *Mitakshara* law: and Baboo Shama Churn Sircar (*Vyavashta Darpana*, p. 1058, note) says it was an up-country case. The second question put does seem to involve the issue as to

the superiority or equality of whole and half blood among brothers. But the answer given is so loose and so little in reply to the question asked that but little value can be attached to it. The case stated is that the first son who died left a widow and a uterine brother. The reply assumes that he died leaving no widow.

The table of inheritance and succession, published some five and twenty years ago by the late Baboo Prosonno Coomar Tagore, purports to be framed in accordance with the Daya-bhaga, Dayatatwa, Dayakrama Sangraha, and other works of the Bengal school. In this table precedence is given to the brother of the whole blood, who stands No. 10 in the list of heirs, while the half-brother stands as No. 11. In the foot-notes to the table it is stated that the brother of the whole blood succeeds first. Then in continuation of a resumé of the law of succession, where there has been separation and reunion, &c., there is this note:—"The undivided immoveable estate on the death of the owner will be equally divided among the whole and half-brothers." This note may be said to throw some doubt on the table. But it is clear to me that Prosonno Coomar Tagore would never have framed the table as he did (and reproduced it in pamphlet shape in 1868) if he had not intended the rule given in his note to be construed in a limited sense, as restricted to cases of succession to a portion of the joint estate which on a partial partition had remained undivided.

In the Vyavastha Darpana of Baboo Shama Churn Sircar, preference is given to the whole blood. The text of Yama is translated thus:—"Whatever immoveable property may remain undivided, that appertains to all; but the divided immoveables must on no account be taken by the half-brother:" and a distinct opinion is expressed that this is the real meaning of the text, in fact, that it must be read as suggested in Colebrooke's Digest, and that it does not apply to ordinary cases of succession amongst brothers who have never separated at all (Vyavastha Darpana, pp. 203, 204, and p. 1057, note).

No cases have been cited to us in which the question has been judicially decided, except those which are mentioned in the order of reference.

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On the whole, I am of opinion that in Bengal the brother of the whole blood succeeds, in the case of an undivided estate, in preference to a brother of the half-blood.

And this being the unanimous opinion of the Court, these cases will be sent back for final disposal to the Division Bench which referred the question for our decision.

ORIGINAL CIVIL.

Before Mr. Justice Phear.

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 COMPANY, LIMITED (DEFENDANTS).

Contract Act (Act IX of 1872), s. 28, Exception 1—Agreement to refer to Arbitration—Revocation of—Common Law Procedure Act of 1854 (17 & 18 Vict., c. 125)—9 & 10 Will. III, c. 15—3 & 4 Will. IV, c. 42—Specific Performance of Agreement to refer—Suit for Damages for Breach of Agreement to refer.

A contract entered into by the plaintiffs with the defendants contained a clause providing, in case of any dispute, for a reference to two arbitrators in England, one to be appointed by each of the contracting parties, whose decision in the matter was to be final. The contract contained no provision for making the submission to arbitration a rule of Court, so that 9 & 10 Will. III, c. 15, and 3 & 4 Will. IV, c. 42, s. 39, did not apply. Matter of dispute arising, the defendants refused to appoint an arbitrator, and an award was made by arbitrators appointed by the plaintiffs. Previous to the making of the award, the plaintiffs, under the provisions of the Common Law Procedure Act, 1854, had the submission to arbitration made a rule of the Court of Common Pleas. In a suit in which the plaintiffs' claim was for damages awarded by the arbitrators and incurred by the plaintiffs in respect of the breach of the contract, *held*, the award was invalid. The making the submission a rule of Court has not the effect of depriving a party of his right to revoke, at any time before the award, the authority of arbitrators whom he has appointed: still less could it have any effect to prevent him from declining to appoint an arbitrator.

Held also, the contract was not within the scope of s. 28, Act IX of 1872. To make an agreement conform to Excep. I of that section, the jurisdiction of the Courts must be excluded in all respects, except the matter which is the result of the arbitrators' award.

Agreements which exclude the jurisdiction of the Courts until an award is made, as in *Scott v. Avery* (1), are within that Exception, and are not illegal.

Quære.—Whether it was intended by that exception to authorise the Court to entertain a suit for specific performance of an agreement to refer to arbitration?

Section 28, Act IX of 1872, does not forbid an action for damages for the breach of such an agreement.

IN this case the plaintiffs, who carried on business under the style of Graf and Banziger, on 18th October, 1873, entered into a contract with the defendants for the sale of 1,000 cases of castor oil, the terms of which contract as given in the bought note were as follows:—

MESSES. GRAF AND BANZIGER,

We have this day bought for you and on your account from Messrs. Gallois Montbrun, and Fils, Secretaries, the undermentioned goods, *viz.*:—

Coringa Company, Limited, 1,000 cases of about 2 Bengal bazar maunds each, of castor oil at the rate of 5 pence per pound English cost and freight per sailing vessel to London. Shipment to be made and completed within the months of November and December, 1873, and the quality is guaranteed equal to Calcutta, or *K B* No. 1 for November and December, 1873, shipments: and in case of any dispute the same to be decided by two competent London brokers, one to be appointed by the buyers', the other by the sellers' agents; such brokers' decision to be final. Sellers to draw on the buyers with documents attached on demand at the exchange of two shillings per rupee.

BENNERTZ & Co.,

Brokers.

IN pursuance of this contract, the defendant-Company duly shipped to London one parcel of 498 cases, and another parcel of 152 cases, making together 650 cases, per ship *Dunphaile Castle*, and subsequently a third parcel of 350 cases by the ship *Ivanhoe*. On 18th November, 1873, before delivery of any of the oil, the defendants wrote to their agents in London authorising them to name a broker as arbitrator on their behalf, under the contract, in order to decide whether the oil on its arrival was

(1) 2 Jur., N. S., 815; S. C., 5 H. L. C., 811.

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equal in quality to *K B* No. 1 castor oil shipped for London in November and December.

The shipment per *Dumphaile Castle* arrived in London at the end of March, and on 1st April the plaintiffs' agents in London wrote to the defendants' agents in London, informing them that a certain firm buyers of 500 cases of the oil claimed an allowance of three farthings a pound, and asked them to appoint an arbitrator. The defendants' agents answered on the same day that they were instructed for reasons which they mentioned to decline arbitration. The plaintiffs' agents on the same day also wrote to the defendants a similar letter with respect to the 152 cases of the first shipment. Having thus given notice to the defendants' agents in London the plaintiffs' agents appointed two arbitrators, who eventually chose an umpire to decide the matter in dispute with respect to the shipments by the *Dumphaile Castle*; and on 16th April the umpire awarded an allowance of three farthings per pound on the entire parcel. On 3rd June, 1874, the plaintiffs' agents had the submission to arbitration made a rule of the Court of Common Pleas, and on 18th July, the defendants' agents still refusing to do anything in carrying on the arbitration, an arbitrator, appointed by the plaintiffs after the submission had been made a rule of Court, awarded an allowance of one penny three farthings per pound on the 350 cases by the *Ivankoe*.

The plaintiffs' claim amounted to Rs. 7,664-11-5, and was made up of a series of items set out in a schedule appended to the plaint, the plaintiffs alleging that the schedule represented the damages awarded by the arbitrators and incurred by the plaintiffs in respect of the defendants' breach of contract.

On the case coming on for settlement of issues, Mr. Phillips for the plaintiffs proposed to raise the issue whether there had been any breach, and what were the damages arising therefrom.

Mr. Macrae however raised an objection that the plaint disclosed no cause of action.

Mr. *Phillips* contended that the agreement to refer to arbitration was to be carried out in England, and therefore the provisions of the Common Law Procedure Act, 1854, applied. By

s. 13 of that Act, when one of the parties who have agreed to refer fails to appoint an arbitrator seven clear days after the other party has appointed an arbitrator, the latter may, after due notice, appoint his arbitrator as sole arbitrator in the reference, and to proceed with the arbitration. [PHEAR, J.—That can only take place when a reference has been made. Here there has been no such reference.] Under s. 14, when a reference is to two arbitrators, and the document authorising it does not exclude an umpire or provide for the appointment of one, the two arbitrators may appoint an umpire. S. 17 enables the parties to make an agreement or submission to arbitration by deed or instrument in writing a rule of one of the superior Courts. This is what the plaintiffs have done in the present case; both the awards are therefore valid.

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Mr. *Macrae* for the defendants.—Under s. 28 of Act IX of 1872 the plaintiffs are restricted by the nature of the contract to a suit for specific performance of the agreement to refer, or for the recovery of the amount awarded by the arbitrators. The defendants having refused to join in a submission to arbitration, the arbitration made at the instance of the plaintiffs is of no effect. The agreement to refer in this contract was revocable at the will of the defendants. Before the passing of 9 & 10 Will. III, c. 15, it was competent to either party to revoke a submission, even though the submission was made a rule of Court. After the passing of this Statute, a party revoking an agreement after it had been made a rule of Court, was guilty of contempt, and was liable to be attached. S. 39 of 3 & 4 Will. IV, c. 42, does not apply to this case, as this contract does not contain a special provision to make it a rule of Court. It might, however, be argued that this agreement, although not in terms within 3 & 4 Will. IV, c. 42, s. 39, is brought within that category by the 17th section of the Common Law Procedure Act of 1854, which permits any submission to be made a rule of Court, unless the contrary intention appears; but this has been otherwise decided—*In re Rouse and Meier* (1); see also *Mills v. Bayley* (2)

(1) L. R., 6 C. P., 212.

(2) 2 H. & C., 36.

1875 and *Thompson v. Anderson* (1). The submission to arbitration
 KOEGLER having once been made a rule of the Court of Common Pleas
 v gives that Court exclusive jurisdiction on all subsequent pro-
 THE CORINGA ceedings—*Nichols v. Roe* (2).
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Mr. *Phillips* in reply.—*In re Rouse and Meier* (3) was not a case under ss. 13 and 14 of the Common Law Procedure Act, 1854. The question there was, whether, both parties having appointed arbitrators, the Court could give leave to revoke, and it was held the parties could revoke, though the Court could not give leave, that is, the party could revoke a submission, which he had made. In this case the defendants made no submission, and never appointed arbitrators, and it cannot be that the provisions of ss. 13 and 14, which provide for the appointment of an arbitrator *in invitum* can be frustrated by the party against whom the power is intended to have effect refusing to recognise such appointment. The section itself assumes that he does and will refuse. In *Thompson v. Anderson* (1) the parties had voluntarily made a submission to an arbitrator. These cases therefore are perfectly distinguishable. With respect to s. 28 of the Contract Act, the argument goes the length of saying that not only may a submission to a particular arbitrator in pursuance of an agreement be revoked, but that the agreement itself may be rescinded. If the agreement is rescinded, it is not “subsisting” within the words of the Act, and therefore the action is not barred by the section.

PHEAR, J. (after stating the facts as above and the nature of the plaintiffs’ claim, continued) :—As to this claim the defendants maintain there has been no binding award made; and clearly, as it seems to me, the plaintiffs, on their own showing, cannot succeed on this footing alone.

In the first place it is not the fact that all the items in the schedule were awarded by any arbitrators, and in the second place there is not a pretence for saying that the award of the 16th April made in respect of the *Dumphaile Castle* parcel

(1) L. R., 9 Eq., 523.

(2) 3 M. & K., 431.

(3) L. R., 6 C. P., 212.

was a decision binding on the defendants on the terms of the contract. Neither of the arbitrators, who assumed to make that award, was appointed by the defendants' agents; nor had the contract at that time been made a rule of Court, and therefore none of the provisions of the Common Law Procedure Act of 1854 (even assuming that they could be of any use to the plaintiffs) applied. In other words, the defendants had not then appointed an arbitrator either actually or constructively, and had in fact absolutely refused to do so.

As to the award of the 18th July with regard to the *Ivanhoe* parcel, which was made after the agreement was made a rule of Court, there might have been some question on account of the operation of the Common Law Procedure Act, were it not for the case of *In re Rouse and Meier* (1), the effect of which cause in my opinion is that the plaintiffs get no benefit out of that award. Rouse and Meier were the respective contracting parties. They had agreed that, in the event of any dispute arising out of the contract, every such dispute should be referred, with all usual powers, to two disinterested cotton brokers (or their umpire) for arbitration, buyer and seller each nominating one. This agreement to refer was made a rule of Court; both parties appointed their arbitrators, and the matter was proceeding in due course, when on account of a certain point of difficulty with regard to the nomination of an umpire, the Messrs. Rouse applied to the Court of Common Pleas, of which the agreement had been made a rule, asking, in effect, that the arbitration might be stopped and put an end to, but the Court refused to make any order to this end saying, in substance, you can do it yourselves. You have full power if you think fit to withdraw your submission to arbitration, even though that submission has been made a rule of Court. Willes, J.'s judgment makes the reasons for this decision very plain indeed. This decision is supported to a considerable extent by the views expressed by Malins, V. C., in *Thomson v. Anderson* (2), but still more strongly so by the judgment of Wood, V. C., in an earlier case of *Smith v. Whitmore* (3).

(1) L. R., 6 C. P., 212.

(2) L. R., 9 Eq., 523.

(3) 10 Jur., N. S., 65.

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The result of these decisions is to make it certain that, in the class of agreements to which the present agreement belongs, the effect of making the agreement a rule of Court under the provisions of the Common Law Procedure Act, 1854, is only to give more extended powers to the arbitrators in the matter of the reference, and to render the parties liable as for contempt of Court for improper conduct in the reference. It does not at all deprive the parties of their Common Law right to revoke the authority of the arbitrators, to whom they have submitted the matter of dispute, at any time before the award; and if this be the case when the dispute has been actually referred to the arbitration of specified persons, it is difficult to see how the provisions of the Common Law Procedure Act can have any effect whatever to prevent a party to an agreement from declining to appoint an arbitrator if he chooses to do so.

The conclusion, then, at which I arrive is that the award of the plaintiffs' arbitrators, made after the agreement had been made a rule of Court, is in no degree a decision under the contract, which is the basis of this suit. Neither the award of the 16th of April, nor the award of the 18th of July, is such a decision as the parties to the present suit agreed should be final in the event of a dispute, and the ground upon which the plaintiffs claim Rs. 7,000 and odd fails them. This being so, the defendant-Company maintains that, if a suit on the contract can be entertained in this Court at all, which he denies for reasons which I shall presently refer to, it is restricted by s. 28 of the Indian Contract Act to a suit for specific performance, which this suit certainly is not. The words of s. 28 are as follows:—

"Every agreement, by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights, is void to that extent.

"*Exception 1.*—This section shall not render illegal a contract by which two or more persons agree that any dispute which may arise between them in respect of any subject or class of subjects shall be referred to arbitration, and that only the

amount awarded in such arbitration shall be recoverable in respect of the dispute so referred.

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“ When such a contract has been made, a suit may be brought for its specific performance ; and if a suit other than for such specific performance, or for the recovery of the amount so awarded, is brought by one party to such contract against any other such party, in respect of any subject which they have so agreed to refer, the existence of such contract shall be a bar to the suit.”

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And assuming for the moment that the present contract is of such a character as to fall within the scope of this section, the defence which is set up seems to me not only effective against the present suit, but also goes to show that the plaintiff is truly in a most unhappy predicament, for he is without any remedy whatever. The specific performance needed is the appointment of an arbitrator, and it is, I need hardly say, quite settled in England that a Court of Equity cannot entertain a bill for specific performance of an agreement to refer. The Master of the Rolls in *Gourlay v. The Duke of Somerset* (1) seems to say that such a bill was never heard of. If the ordinary rules which govern Courts of Equity in England are to apply, the specific performance of such a contract cannot be decreed. It is in truth impossible to compel a person to select an arbitrator. The only alternative is something which seems to have been attempted in the Common Law Procedure Act, namely, to make an appointment by the Court, or an appointment by the other party, under certain circumstances, equivalent to an appointment by the party who declines to perform his contract.

And further, to enforce the specific performance of such a contract would be a direct violation of the principle which Willes, J., and Wood, V. C., in the two cases which I have just referred to, laid down as constituting the reason why, in spite of all inconveniences, a party was at liberty under the Common Law to decline to refer to arbitration a matter which he had previously agreed to refer.

I am not certain whether the Indian Legislature in making

(1) 19 Ves., 429.

1875 the Indian Contract Act intended to clear the ground of all
KOEGLER such rules in the matter as govern the Courts of Chancery in
v. England, and intended that in spite of them the Courts of this
THE CORINGA country should entertain such a bill, and should attempt to do that
OIL COMPANY. which the Court of Chancery holds it cannot do or, at any rate,
ought not to do. If it had so intended, however, I should have
expected that it would have made its meaning more plain than
it is, and would probably also have directed the Courts of this
country how to proceed in such a suit.

It is not incumbent on me fortunately now to determine the
question which thus presents itself, because the defence raised,
if good, is a sufficient answer to this suit, and we can wait till
a suit for specific performance is brought for the determination of
this point.

There is however a third alternative even in cases where this
section applies, *viz.*, an action for damages for breach of the
agreement to refer. Mr. Phillips was desirous of arguing that
this would be forbidden by the words of s. 28, but I think
it is not so. The words are:—"If a suit, other than for such
specific performance, or for the recovery of the amount so
awarded, is brought by one party to such contract against any
other such party, in respect of any subject which they have so
agreed to refer, the existence of such contract shall be a bar
to the suit." It seems to me that the suit would not be a suit
in respect of the subject which the parties had agreed to refer,
but a suit for damages for breach of the contract to refer. No
doubt, in such a suit, there would be great difficulty as to the
measure of damages. Cases would occur in which the damages
for breach of contract to refer might be precisely the same as
the money which it would fall to the arbitrators to award if
they were called on to arbitrate. But, in the majority of cases,
this would not be so, and it would be difficult, if not impossible,
to pass from the damages for breach of the contract to refer
to the amount which the arbitrators might or should have awarded
had they carried out the arbitration.

However this may be, I come to the third question whether this
contract is in fact a contract lying within the scope of s. 28
of the Indian Contract Act; and upon looking a little closely

into it, I have come to the opinion that it is not. The text of the section (if I may call it so) enacts that every agreement by which a party is restricted absolutely from enforcing his rights under any contract by the usual legal proceedings in the ordinary tribunals is void. The words of the enactment relied upon in the present case form an exception to the operation of that text, and the matter excepted is "an agreement that any dispute shall be referred to arbitration, and that only the amount awarded in such arbitration shall be recoverable in respect of such dispute," which means (as I understand it) that an agreement by which the party is not absolutely restricted from enforcing all his rights under or in respect of the contract by the usual legal proceedings, but is only restricted from enforcing any such rights as are not given to him by the arbitrators in the shape of money-compensation is it not forbidden or made illegal by the section. In order to make the agreement conform to Exception 1, there must be an exclusion of the Courts in all respects except the matter which is the result of the arbitrators' award. This was so in the leading case of *Scott v. Avery* (1), and so also in the subsequent case of *Tredwen v. Holman* (2). The excluding words there were :—"No action at law shall be brought until the arbitrators have given their decision." The Court of Exchequer held that *Scott v. Avery* (1) governed the case, and decided that exclusion of the kind was not void at law. I imagine that the intention of the Legislature in enacting Exception 1 to s. 28 was to make contracts similar in character to those in *Scott v. Avery* (1) and *Tredwen v. Holman* (2) lawful contracts, notwithstanding that they excluded the jurisdiction of the Courts until the arbitrators had made their award ; and I do not interpret these words "and that only the amount awarded in such arbitration shall be recoverable in respect of the dispute so referred" in any large sense. Now, on going back to the words of the contract between the plaintiffs and the defendants, we find nothing whatever to exclude the jurisdiction of the Civil Courts even for the most limited period. It is the ordinary case of mutual stipulation

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(1) 2 Jur., N. S., 315; S. C., 5 H. L. C., 311.

(2) 8 Jur., N. S., 1080; S. C., 1 H. & C., 72.

1875 that in case of dispute the same is to be decided by two arbitrators, one to be appointed by the buyer, and one by the seller, and there is an absence of any clause forbidding recourse to the Court.

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On the whole, I am of opinion that s. 28 does not apply to this case, and also that there has been no decision of the arbitrators according to the contract upon which the plaintiffs can claim the damages awarded. The matter is entirely open, and there is no reason why the plaintiffs should not apply to the Civil Court for their remedy. With this view the first issue will be—

Was there a breach, and if so, what are the damages?

Attorney for the plaintiffs: Mr. Pittar.

Attorney for the defendants: Mr. Hechle.

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Macpherson.

IN THE GOODS OF SHAMACHURN MULLICK (DECEASED).

1875 IN THE MATTER OF THE PETITION OF RAJRANEE DOSSEE AND ANOTHER.

July 2. *Probate, Grant of—Act XIII of 1875 — Rule 4 of Rules of High Court, 22nd June, 1875.*

Act XIII of 1875 does not empower the High Court to grant probate limited to property in any province or presidency, in cases where an unlimited grant had been made extending only to property in another province or presidency before the passing of the Act.

Per Macpherson, J.—Rule 4 of the Rules of 22nd June, 1875 (1), as to grants of probate, only applies to grants of the class mentioned in Rule 1, *i. e.*, only to cases in which the application for probate is made after 1st April, 1875, and not to cases in which the application was made before that date.

APPEAL from a decision of Markby, J., dated 17th April, 1875, refusing a grant of probate. Shamachurn Mullick, a Hindu inhabitant of Calcutta, died there on 11th December, 1872, leaving property and effects within the local jurisdiction of the High Court at Calcutta, and also within the local

jurisdiction of the High Court at Bombay. He left a will in the English language, dated 8th March, 1863, and a codicil thereto, also in English, dated 20th November, 1865. By his will he appointed his widow, S. M. Rajranee Dossee, and Nundolall Mullick, his only son, to be sole executors thereof, and probate of the will and codicil was, on 1st August, 1874, duly granted to them as to the property and effects of the testator within the local jurisdiction of the High Court at Calcutta. The property and effects of the testator situate in the local jurisdiction of the High Court at Bombay consisted of twenty-five shares of the new Bank of Bombay, of the value, with the dividends and interest due thereon, of Rs. 20,875. The persons appointed executors were both residents in Calcutta, and had no property in Bombay.

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An application was made by the executors to the High Court in a petition stating the above facts for a grant to them of probate of the will and codicil limited to property of the testator in Bombay; and a certificate under s. 3 of Act XIII of 1875 was asked for to be transmitted to the High Court at Bombay. The order made on the hearing of that application was as follows:—

MARKBY, J.—Probate having been already granted by this Court previous to the new Act, I do not think I have any power under the new Act to grant probate limited to property of the deceased situate in Bombay.

From this decision the executors, Rajranee Dossee and Nundolall Mullick, appealed. On 22nd June, 1875, rules were passed by the High Court under Act XIII of 1875 (1), Rule 4 of which makes provision for amending a grant of probate by extending it to all property of the testator in British India.

Mr. *W. Jackson* for the appellants contended, 1st, that the Court had power under Act XIII of 1875 to grant probate limited to the property in Bombay: and this power would extend to cases where a limited grant of probate had been obtained before the passing of the Act. A grant of probate under that

(1) 15 B. L. R., H. Ct. Rules, p. 10.

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Act would have effect over the whole of British India, unless specially limited by the grant; 2nd, that if the Court should consider it had no power to grant probate limited to property in Bombay, the grant might, under Rule 4, be amended by extending it to property in Bombay. It would cause great inconvenience in this case if this Court refused to grant the probate altogether.

The following judgments were delivered :—

GARTH, C. J.—I am of opinion that Markby, J., was perfectly right in refusing this application. It was not made to him in the form in which it is now made to us, to amend the original grant of probate. The application to him, the only one which can properly be made the subject of appeal to us, was for the purpose of obtaining in this Court a limited grant of probate, extending to goods in the Presidency of Bombay; and the question is, whether Act XIII of 1875 enabled Markby, J., to make an order of that kind. I am of opinion that it did not. The Act, no doubt, was intended to remedy some of the inconveniences pointed out by Mr. Jackson. The preamble recites the purpose for which it was passed. It says that, “whereas, under the Indian Succession Act, 1865, the effect of an unlimited grant of probate made by any Court in British India is confined to the province in which such grant is made; and that it is expedient to extend over British India the effect of such grants, when made by a High Court.” The Act then in effect provides that an unlimited grant of probate, made by a High Court after the 1st day of April, 1875, shall, unless otherwise directed by the grant, extend to all goods belonging to the testator throughout British India, whereas before the Act, a similar grant would only have extended to goods in the particular province in which it was made. The object of the Act being thus plainly pointed out by the preamble, it appears to me that the Act did not empower a Judge of this Court to grant a limited probate, extending to goods in another province, after an unlimited grant had already been made before the Act passed, extending only to goods in the Province of Bengal. I

think therefore that the view taken by Markby, J., was quite correct.

The second branch of Mr. Jackson's application to us was to amend the original grant of probate (which had been made before the passing of the Act) by extending it to all goods belonging to the testator throughout British India. He did not ask Markby, J., to do this; nor could he have done so; because he founds this part of his application upon a rule of this Court which came into operation after the date of Markby, J.'s order. We think therefore that there is clearly no ground for any appeal to us in this respect.

MACPHERSON, J.—I wish to add only one word. The fourth of the new Rules of Court of the 22nd of June (to which reference has been made) must be read along with the other Rules. It manifestly applies only to grants of the same class as the grants mentioned in Rule 1; and Rule 1 applies expressly only to cases in which the application for probate or letters of administration is made after the 1st of April, 1875, and not to cases in which the application was made before that date.

Appeal dismissed.

Attorney for the appellants: Mr. Carruthers.

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Markby.

DORAB ALLY KHAN (PLAINTIFF) v. KHAJAH MOHEEOODEEN
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8, 23.

Purchaser at Sale by Sheriff under Writ of fieri facias—Sale subsequently declared invalid—Suit to recover Purchase-money—Liability of Execution-Creditor—Jurisdiction—Act VIII of 1859, ss. 201, 242.

The plaint in a suit by *A* against *B* stated that, in a suit in which *B* had recovered judgment against *C*, a writ of *fi fa* was, on 18th June, 1866, issued on the application of *B*, directing the Sheriff of Calcutta to levy the judgment-debt by seizure, and, if necessary, by sale, of the property of *C* in Bengal, Behar, and Orissa, or in any other districts which were then annexed or made subject to the Presidency of Fort William in Bengal; that the writ did not authorize the execution thereof against immoveable property in Oudh; that under the writ the Sheriff, acting under instructions from *B*, seized and put up for sale the right, title, and interest of *C* in a talook in Oudh, which was purchased by *D*, to whom the Sheriff executed a bill of sale, and on receipt of the purchase-

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money paid a portion thereof to *B* and the balance to *C*, and put *D* into possession of the property, and he remained for some time in possession and in receipt of the rents and profits; that, eventually, in proceedings in Oudh, instituted by *D* for partition of the property purchased by him, the sale was pronounced to be null and void and was set aside, and *D* was removed from possession (1); and that the plaintiff sued as the executor of *D* to recover the whole of the purchase-money from *B*. *Held*, on appeal, affirming the decision of Phear, J., that the plaint disclosed no cause of action: 1st, because a purchaser, who, after the execution of the conveyance, is evicted by a title to which the covenants in the conveyance do not extend, cannot recover the purchase-money from his vendors; 2nd, because the Sheriff was not the agent of *B* for the sale of the property, and therefore no privity of contract existed between *B* and *D*; 3rd, because *D* having been for some time in possession of the property and in receipt of the profits thereof, there had not been a total failure of consideration, and the plaintiff accordingly could not maintain the action in its present shape, *viz.*, for money had and received.

The judgment of the High Court in *Biseswar Lal Sahoo v. Ramtukul Singh* (2) explained by Phear, J., and ss. 201 and 242 of Act VIII of 1859 observed upon.

APPEAL from a decision of Phear, J., dated the 22nd April, 1875, dismissing a suit on the ground that the plaint disclosed no cause of action.

The plaint in the suit stated that, on the 18th June, 1866, on the application of the present defendant in a suit in which he had recovered judgment against Hossein Ali Khan and others, a writ of fieri facias was issued to the Sheriff of Calcutta, directing the Sheriff to levy a certain sum of money upon the property, moveable and immoveable, of the execution-debtors in that suit within the provinces, districts or countries of Bengal, Behar, Orissa, or in the province or district of Benares, or in any other factories, district or places which then were annexed to and made subject to the Presidency of Fort William in Bengal, by seizure, and, if necessary, by sale thereof; that the said writ did not legally authorize the levy of the sum in the said writ mentioned by the seizure or sale of immoveable property in Oudh; that the Sheriff, by the authority of the execution-creditor, the present defendant, and on the express instructions of his attorney, and professing to act under and by virtue of the

(1) It did not clearly appear from the plaint in what way or by whom the purchaser was evicted.

(2) 11 B. L. R., 121.

said writ, seized the right, title, and interest of the execution-debtor in a certain talook in the district of Lucknow in Oudh, and that the said Sheriff, on 4th October, 1866, put up to sale the same right, title, and interest of the execution-debtor; that one Dianut Adulah became the purchaser of the property for Rs. 26,000, and that a bill of sale was executed to him by the Sheriff accordingly: that Dianut Adulah, upon the delivery of the bill of sale, paid to the Sheriff the whole Rs. 26,000, and he, on the 12th October, 1866, paid to the present defendant, then plaintiff, Rs. 5,000, and on the 25th October, 1867, paid to the defendants in that suit the balance of the purchase-money, less his poundage and charges; and that the Sheriff, by his officer, subsequently put the said Dianut Adulah in possession of the talook, but that such sale and delivery of possession was not legal or operative by the law then in force in Oudh, and did not pass the right, title, and interest of the judgment-debtor, or other persons, in the said talook to Dianut Adulah; that Dianut Adulah remained in possession as owner collecting the rents, and eventually instituted proceedings for a partition of a portion of the premises purchased under the bill of sale, whereupon the Judicial Commissioner pronounced the sale to be null and void, and set it aside; and that, "by an order passed by the Commissioner of Lucknow on a petition by Dianut for a review of the order passed by the Officiating Commissioner of Lucknow in matters relating to the sale, the said order was confirmed and the sale declared null and void." The plaint then alleged that the said order was final and conclusive, and that the sale was thereby set aside and annulled, and Dianut Adulah was, in August, 1868, removed from possession of the property (1).

The plaintiff set out an account showing that Dianut Adulah collected the sum of Rs. 10,937-10 whilst he was in possession, from which, after deducting Government revenue and other charges, a balance was left of Rs. 446-6-9, which he said was all the profit which Dianut Adulah obtained from the property; and he stated that Dianut Adulah died leaving the plaintiff his executor; and that he, the plaintiff, applied to the defendant for repayment of the sum of Rs. 26,000, and, on the

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(1) See note (1) on p. 56.

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defendant's refusal to pay, he brought the present suit for that sum with interest, alleging that his cause of action arose on 12th October, 1866. The plaint also stated that the suit was brought for that sum as money had and received by the defendant for Dianut Adulah.

The plaint was presented for admission to Macpherson, J., and rejected by him on 5th September, 1872, as not disclosing a sufficient cause of action. On appeal from the order rejecting it, it was ordered that the plaint should be admitted, though the Court refrained from expressing any opinion as to its sufficiency; and a written statement was then filed by the plaintiff. The case then came on before Phear, J., for settlement of issues, and the issue was raised whether a good cause of action was disclosed in the plaint.

PHEAR, J. (after stating the facts, continued):—To put these facts somewhat more concisely, I may say the plaintiff's testator bought the property at the Sheriff's sale in 1866, paid the purchase-money to the Sheriff, obtained possession, and, after enjoyment of possession for a substantial period, was ejected under some decree or order of the local Courts, on the ground that the Sheriff's sale was null and void. The plaint does not anywhere state the ground on which the defendant is liable in law to refund the purchase-money. The sale at which he bought was a sale ostensibly made by the High Court through its officer the Sheriff under the direction of a writ of *fi fa*. If it is intended by the statements in the plaint that it should be inferred that this sale was made *ultra vires*, then possibly the plaintiff may be understood to place the liability of the defendant on the ground that he had wrongly put this Court in motion in that matter. And no doubt a person who wrongly puts a Court in motion, may, under some circumstances, become liable to compensate the person aggrieved by the result of the Court's action. But in the first place I do not find anything in the plaint tending to show that Moheeoodeen wrongly put the Court in motion. There is nothing to show that he did not act entirely *bond fide* in what he is alleged to have done. Nay it seems to me there is nothing whatever in the plaint to show that the course taken by him was not perfectly right, and the sale even, which was effected by the

Sheriff, a perfectly good sale. The judgments of the Oudh Courts are not set out, and could not in any case have much force on this point. But whatever force they may be conceived to have, is entirely lost by reason of the plaint not disclosing the nature of them, or even giving any indication of the subject of the suits in which they were passed and of the parties thereto.

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By the Charter of the Supreme Court, the property, both moveable and immoveable, of suitors in that Court was made liable to be seized and sold in satisfaction of decrees of that Court, certainly throughout the whole of the area mentioned in the writ of *fi fa* in the present case, and the Supreme Court had complete authority to effect a sale of property for the purpose of satisfying a decree which it could make against the owner of the property. This liability of the property of suitors in the Supreme Court to be seized and sold, was confirmed and extended by Act VI of 1855,—an Act which I believe is still in force. There are no geographical limits mentioned in the Act, and it appears to be operative certainly as much over Oudh as over the Bengal Presidency. And the Charter Act, 24 and 25 Vict, c. 104, s. 12, enacts—"From and after the abolition of the Courts abolished as aforesaid in any of the said Presidencies, the High Court of the same Presidency shall have jurisdiction over all proceedings pending in such abolished Courts at the time of the abolition thereof, and such proceedings and all previous proceedings in the said last-mentioned Courts shall be dealt with as if the same had been had in the said High Court, save that any such proceedings may be continued, as nearly as circumstances permit, under and according to the practice of the abolished Courts respectively." It was therefore competent to the High Court in entertaining and carrying out all proceedings which had been instituted in and were pending in the Supreme Court when the High Court was created, to do so under and according to the practice of the Supreme Court. And I need hardly add that when Act VIII of 1859 was passed the powers of the Supreme Court in respect to seizing and selling the property of its judgment-debtors under Act VI of 1855 was not in any way interfered with; in fact, it could not be so. By force of these various enactments, when this High Court was called on to carry on the proceedings of a suit originally instituted in the Supreme Court, it was authorized, if it thought fit, to follow the

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practice of the Supreme Court in regard to the mode in which, among other things, it made the property of judgment-debtors available for satisfaction of decrees. And it did follow this practice not only down to 1866, but even two years later; for I have ascertained that execution by *fi fa* of decrees of the Supreme Court was obtained so late as 1868. It is possible, and indeed probable, on the face of the plaint, that the decree to satisfy which this *fi fa* was executed in 1866 was a decree which the High Court could lawfully execute in this manner; and I find, on looking at the plaintiff's written statement, that the decree was a decree of the Supreme Court passed in 1857. It seems to me then that the proceedings by which Moheeoodeen procured this Court to obtain satisfaction for him of his decree are not only not shown by the plaint to be wrong or even irregular, but are such that there is every reason for inferring they were right and valid. Whether Oudh is or is not beyond the limits of the area mentioned in the *fi fa*, there is nothing on the face of the plaint to show, the plaintiff contents himself with asserting that the *fi fa* did not authorize the seizure of property in Oudh. But the plaint does not say that Moheeoodeen was aware of that fact, if it was a fact. It no doubt says he authorized, and that his attorney expressly directed, the property to be seized and sold. It does not say he was aware or had the least reason for supposing that it lay beyond the territorial limits mentioned in the *fi fa*. On the whole, I cannot find in the plaint any cause for holding that Moheeoodeen acted tortuously or of wrong toward the plaintiff's testator in procuring this property to be sold by the Sheriff. But if he is not liable as for wrongful conduct, it may be said he came under some contract or obligation by reason of the part he played in this matter to refund the money to the plaintiff in the events which have happened. So far as any liability can be supposed to arise out of the factum of the sale itself, I think the reasoning of Sir Barnes Peacock in *Sowdamini Chowdrain v. Krishna Kishore Poddar* (1) is conclusive; it applies equally to the case of a sale by the Sheriff and the case of a sale in accordance with the provisions of Act VIII of 1859. In both cases alike the sale is made by the Court for the judgment-debtor at the instance of the judgment-creditor.

(1) B. L. R., F. B., 11.

Sir Barnes Peacock clearly pointed out that neither the judgment-creditor, nor the judgment-debtor, nor any one else, in such a sale entered into any covenants or contract, express or implied, with the purchaser relative to the subject of the sale. All that was guaranteed by sale was that the judgment-debtor should not recover the subject of sale from the purchaser. That guarantee I apprehend is not in the shape of any contract on the part of the judgment-creditor or of the judgment-debtor, but simply proceeds from, and is limited in effect by the authority of, the Court which makes the sale. If the Court is competent to order the sale to be made, that order binds the judgment-debtor everywhere. And I do not think that the judgment-creditor, by the mere act of putting the Court in motion, undertakes, as towards a future purchaser, that the Court has the requisite authority. It seems, therefore, plain to me that there is no obligation of the nature of a contract resting on the defendant Moheewooddeen to refund to the plaintiff the testator's purchase-money. The sole remaining point of view in which the plaintiff's claim can be put seems to be this, that, on all the facts which have occurred, the defendant Moheewooddeen, who caused the sale to be made, is bound by some general principle of equity and good conscience to return the money to the purchaser, now that the latter has lost the benefit of his purchase. But it seems to me that this cannot be so unless the loss of the benefit of the purchase is due in some way to the fault of Moheewooddeen. It is not quite easy perhaps to satisfy one's self from the plaint what precisely has happened in the matter of eviction. If the plaintiff's testator was evicted at the instance of the judgment-debtors in the former suit, or any one claiming through them, it seems to me almost impossible to see how Moheewooddeen can be held in fault at all. The property of these persons was, as appears on the face of this plaint itself, liable to satisfy his decree. It has been made to satisfy it, and the only wrong thing that has been, if any wrong thing has been, done was that the proceedings by which this has been effected were not had in strict pursuance of the Civil Procedure Code. This might give the judgment-debtors a right to have the sale set aside on repayment of the purchase-money, but certainly I can see no good grounds in equity or good conscience

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why by reason of it they should have it set aside and recover the property free of their creditor's claim. In other words, after the best consideration I have been able to give to the plaint, I can find no ground of tort, contract, or equity on which the plaintiff can claim to be repaid the Rs. 26,000 by Moheeroodeen. A case (1), lately decided by the Privy Council, was quoted before me for the purpose of supporting the plaintiff's right of suit, and especially, as I understand, for the purpose of showing that in setting aside such a sale as that which was made by the Sheriff to the present plaintiff's testator, the Court has no discretion, founded on the ordinary principles of equity and good conscience, relative to the conditions on which its decree is to be passed: that, in short, the evicted purchaser has no right to look for compensation from the judgment-debtor, who evicts him. Even if this were the effect of the decision, as I think it is not, by parity of reasoning, it affords authority for the position that he is equally disentitled to look to the judgment-creditor.

That case, however, is in some of its features rather remarkable; and I propose to examine its real scope and effect. One Ram Tuhul Singh's zemindari was sold for arrears of revenue, and the surplus proceeds, Rs. 35,000, were lying in the Collectorate, when Sheo Persad, who had a decree outstanding against Ram Tuhul, attached and sold those proceeds to one Biseswar Lal. The purchase-money, Rs. 1,000, was paid into Court, and applied to the satisfaction of Sheo Persad's decree, together with two or three other decrees. During the proceedings Ram Tuhul, to the knowledge of Biseswar Lal, had been suing the person who was the purchaser of his zemindari at the revenue sale and the Government to get the sale set aside; and he succeeded in getting it set aside before Biseswar had obtained any fruit of his purchase. So that when Biseswar under his purchase asked, as he did, to have the Rs. 35,000 surplus proceeds paid out to him, the Collector refused his application on the ground that the money was not the money of Ram Tuhul. On this state of facts Biseswar brought a suit against Ram Tuhul and Sheo Persad (that is, the judgment-creditor and the judgment-debtor in the suit in which he had bought the Rs. 35,000) and also

(1) *Ram Tuhul Singh v. Biseswar Lall Sahoo*, 15 B. L. R., 208; S. C. in Court below. 11 B. L. R., 121.

against the other decree-holders, who had been satisfied out of his Rs. 8,000, seeking to recover his purchase-money. The High Court held that Biseswar was entitled in that suit to recover his purchase-money, *i. e.* Rs. 8,000, from Ram Tuhul; but, on appeal, the Privy Council reversed this decision, holding that Biseswar having brought a chance could not recover his purchase-money, now that the chance had turned out worthless. And in the judgment given to this effect are the passages which have been quoted during the argument before me in support of the plaintiff's present case. Unfortunately the respondent did not appear at the hearing of the appeal before the Privy Council, and the judgment of this Court, which was pronounced by the Chief Justice, was not so full and explanatory, in the particular part of the case which their Lordships of the Privy Council considered to be the governing part of the case, as it might have been. Their Lordships say (1):—"What was the real nature of their purchase at the execution sale? What did they buy? They bought the appellant's interest in the surplus proceeds, subject to the contingency of his succeeding in his suit to set aside the revenue sale, in which event that interest would become nil. They did this with their eyes open, since, at least before the sale was confirmed, they had notice that his suit had been commenced. There was no warranty or contract on his part. The sale was had under proceedings *in invitum*, and indeed against his express protest. The parties were at arm's length. The appellant was free to prosecute his suit; the respondents free to enforce their rights, should he fail, to the uttermost farthing. What they bought, then, was the chance of getting Rs. 35,000 for Rs. 8,000, dependent on the happening or non-happening of a certain event. And a substantial chance it must be taken to have been, since the construction of the clause in the Sale Law, on which the right to annul the sale depended, was doubtful, and the Court of first instance determined the question against the appellant. If that judgment had stood, he would have lost his land; and the respondents would have taken from him all its proceeds, except the Rs. 8,000

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applied in satisfaction of his debts. It is difficult to see upon what general equity existing between parties thus situated the appellant ought to be compelled to restore the respondents to their original position, because the event on which they speculated has ultimately gone against them." And I have no doubt that the High Court, had it entertained the view of the facts of the case which is here expressed, would have been entirely at one with their Lordships of the Privy Council as to the non-existence of the equity supposed. But the High Court (at least some of its members) did not think that this was a case in which the Court had raised money by the lottery of a valid execution-sale to pay the judgment-debtor's debts. It seemed to them, though I admit this was not expressed in the judgment, that although an attempt to do so had in form been made, it was altogether irregular and improper, and under the circumstances of the case it ought not to have been held to have effected the sale of the chance of which the judgment of the Privy Council speaks. Their Lordships of the Privy Council remark (1):—"A good deal, no doubt, has been said in the judgment of the Court of first instance, and something has been said here at the bar, of the irregularity of the execution-sale, and of the miscarriage of the Principal Sudder Ameen in putting up the appellant's possible interest in the surplus proceeds for sale, instead of proceeding under the 242nd section of the Code of Procedure. And their Lordships think it is much to be regretted that that officer did not proceed under the wholesome provision which was designed in such cases to remedy a mischief of frequent occurrence in India—the ruinous sacrifice of property which an execution-sale is apt to involve. But they must observe that since the objections of the appellant were overruled, no attempt has been made to question the regularity or legal effect of that sale; that the respondents held to it as long as there was a hope of their getting anything by it; that their present suit is not framed with the object of setting it aside, or of being relieved from it; and consequently that any judgment declaring

its invalidity or treating it as a nullity, would be extra-judicial."

With the highest possible deference to the exalted tribunal which uttered this passage, I cannot help thinking there is disclosed in it some misapprehension of the procedure laid down by Act VIII of 1859. S. 242 of that Act, to which their Lordships refer, is as follows:—"In all cases of attachment under the preceding sections, it shall be competent to the Court, at any time during the attachment, to direct that any part of the property so attached as shall consist of money or bank notes, or a sufficient part thereof, shall be paid over to the party applying for execution of the decree; or that any part of the property so attached as may not consist of money or bank notes, so far as may be necessary for the satisfaction of the decree, shall be sold, and that the money which may be realized by such sale, or sufficient part thereof, shall be paid to such party."

And the truth is that the Principal Sudder Ameen did proceed under this section, because he could not escape its generality and could proceed under no other section, independently of it; only he seems to have thought that the latter branch of it which authorized him in all cases, except where the attached property is money or bank notes, to sell, applied to bank notes and money.

The sections of Act VIII which direct what is to be done in the execution of decrees can be very shortly referred to. S. 201, which is the first of them in order, says:—"If the decree be for money, it shall be enforced by the imprisonment of the party against whom the decree is made, or by the attachment and sale of his property, or by both, if necessary." These words merely create a general authority, and do not specify the particular steps which may become necessary in particular cases in order to give effect to that authority. I suppose that no one would understand them to enact that in all cases where there is an attachment there must also be a sale. Then follow the sections which direct the Court how to proceed in regard to the details of the processes of attachment and sale of property, founded on the general authority conveyed by s. 201. And of these, s. 237 is the section which prescribes the mode of attachment applicable to the case before the Privy

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Council. The money was money in the hands of an officer of Government, and the attachment for that reason would have to be made by notice to the officer requesting him to hold the money subject to the further order of the Court. After the sections which provide for the various modes in which the property has to be attached according to its nature and situation comes the general section 242 already referred to, which makes it competent to the Court to direct money to be paid over to the party and to direct all other property than money to be sold. There is nowhere, as I understand Act VIII, express authority given to the Civil Court to sell money, and in the sections which follow, directing the Court as to the modes of delivery of possession of sold property after the sale, there is no allusion to money. It appears to me to have been nowhere in the contemplation of the Legislature that money should go through the process of sale. It is simply to be attached and paid over, and there are sufficient provisions in the Code to meet the cases where other parties than the judgment-debtor claim the money. The only purpose of a sale is to turn property which is not ready-money into ready-money, and to render it capable of being paid out by the Court as money of the judgment-debtor. Sale is therefore not needed where the property at the disposal of the Court is already money of the judgment-debtor. In view of this procedure prescribed by Act VIII, it seemed to the Judge of the High Court, unless I misapprehend their opinion that the sale of the Rs. 35,000, which were lying in the Collectorate, by the Principal Sudder Ameen, was altogether irregular and inoperative, and did not pass to Biseswar a contingent right, as their Lordships of the Privy Council, no doubt better advised, think it did, to the Rs. 35,000; *i. e.*, it did not have the effect of giving him the chance of getting Rs. 35,000 for Rs. 8,000, dependent on the happening or not happening of a certain event. It seemed further to these Judges that although, for the reasons just mentioned, Biseswar failed to obtain through the pretended execution-sale any right to the Rs. 35,000, yet, inasmuch as his Rs. 8,000 was thus taken by the Court and applied to the paying off of Ram Tuhul's judgment-debts, he, Biseswar,

was entitled to be treated by the Court as the assignee of the decrees of Sheo Persad and the other creditors; and as assignee of these decrees would be entitled to have the benefit of the attachment which Sheo Persad had placed on his judgment-debtor's property. The only attachment of property that had been made was no doubt the attachment of the actual Rs. 35,000 into which Ram Tuhul's zemindari had been apparently converted by the revenue sale. This happened for the simple reason that Ram Tuhul's property then to all appearance existed in the shape of the rupees, not of the zemindari. It was a matter of indifference to the creditor, which it was: his right to attach the property and to apply it to the satisfaction of his debt was the same in either case: and this being so the Judges of the High Court were of opinion that, against Ram Tuhul, the attachment of the rupees ought so far to avail as an attachment of the property, whatever its form, that Ram Tuhul ought not to have been allowed, when the revenue sale was set aside, to get back his zemindari free from the claim for which Sheo Persad had placed the attachment upon the cash, and they therefore considered it was equitable and just that Ram Tuhul having got back his zemindaries should repay Biseswar the Rs. 8,000 which had been applied to the discharge of his, Ram Tuhul's, judgment-debts, charged as these seemed to be by the effect of the attachment on his property. This, I am now bound to say, was not a right conclusion; but I think I am entitled as one of the Judges responsible for the High Court's judgment to explain, as I have just endeavoured to do, that it was come to upon a view of the facts of the case which is entirely different from the supposed view of the High Court dealt with in the judgment of the Privy Council. Their Lordships in one place observed—"that a fallacy occasioned by some confusion in the use of the words 'transaction' and 'sale' seems to run through the 'judgment' of the High Court;" and they ask "what is the transaction or sale which has been set aside?" I am not personally concerned to defend the aptness of these words as they are used in the High Court's judgment, but I trust it will appear plain from the foregoing explanation what it was that the High Court intended to refer to under them.

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There were in short two principal points in the case, the first was furnished by the execution-sale at which Biseswar purchased; the second by the proceedings taken by Ram Tuhul for setting aside the revenue sale. The late Chief Justice dwelt almost solely upon the latter, and omitted to explain why, in the opinion of the High Court, the former disappeared before it, and left it the governing point of the case. This explanation I have now endeavoured to give.

Whatever may be the intrinsic worth of it, at any rate I hope I have succeeded in showing that the passages to which the learned Advocate-General referred have not, for the purpose of his argument, the force attributed to them. In truth, they have no force or bearing at all, so far as I can see, on the present case; and had it not been for the peculiar circumstances which surrounded the Privy Council's decision, I should not have felt myself justified in dwelling upon it at such length as I have done. I repeat after the best consideration I can give to the facts of the plaintiff's claim as disclosed in the plaint, I think they do not give rise to a good cause of action against Moheeoodeen, and this conclusion goes to the root of the case, which must therefore be dismissed with costs on scale 2.

From this decision the plaintiff appealed.

The *Advocate-General*, offg. (Mr. Paul) and Mr. Phillips for the appellant.

Mr. Lowe and Mr. Branson for the respondent.

The *Advocate-General*.—The writ of *fi fa* only ran into Bengal, Behar, and Orissa, not into Oudh, and therefore a sale under it of property in Oudh conveyed nothing whatever. There is a great difference between the present case and the case of a person who has had opportunity of inspecting title, and purchases without having done so; such a purchaser would have no remedy if his purchase proved to be worthless. *Clarke v. Lamb* (1) shows that distinction, though the principle of that case does not

(1) L. R. 10, C. P., 334.

apply. Here the sale by the Sheriff was without jurisdiction, and wholly void. [GARTH, C.J.—Was the defendant liable for that?] It is submitted he was, the sale took place under the fi fa issued at his instance, and the purchase-money was paid into his hand. The Court is not the agent of the judgment-debtor; on the contrary, the Court is hostile to him; see *Swain v. Morland* (1). This is not a case of a title legally conveyed turning out defective, but a case in which the plaintiff never had any title conveyed to him at all; there was no power to convey; see *Johnson v. Johnson* (2). It is not necessary to enable the plaintiff to get relief that there should have been any fraud. The maxim that every one is presumed to know the law is subject to modification. It does not apply at all to abstruse points of law; see *Cooper v. Phibbs* (3). As to the power of Courts to set aside void deeds, or sales under them, see 1 Story Eq. Jur., ss. 698—701. In this case the deed discloses circumstances which make it void, and no suit could be entertained to set it aside: *Id.*, s. 700a. Suits are to be decided according to equity and good conscience; see *Hunoomanpersaud Panday v. Mussumat Babooee Munraj Koomwaree* (4). As to the writ running into Oudh, the *Gazette* of 11th May, 1856, was referred to.

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Mr. *Phillips* on the same side. — The consideration for the purchase was that the purchasers should get the right, title, and interest of the judgment-debtor in the subject of sale: not that of the Sheriff or the judgment-creditor, for they had no interest. The failure was in the authority to sell, not any defect in the title; the vendors had no authority to convey. The writ was absolutely ineffectual as far as any property in Oudh was concerned; see *Archibald's Practice*, 642, and *Phillips v. Biron* (5) there cited as to the practice in fi fa. The writ would not protect those executing it if void—*Farrant v. Thompson* (6) and *Tancred v. Allgood* (7). An

(1) 1 Bro. & B., 370, *per Dallas*,
C. J., 379.

(2) 3 B. & P., 162.

(3) L. R. 2 H. L., 149.

(4) 6 Moore's I. A., 393, see 410.

(5) 1 Str., 509.

(6) 5 B. & Ald., 826.

(7) 28 L. J. Exch., 362; S. C.,
4 H. & N., 438.

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arrest is void if made out of the jurisdiction of the Court from which the warrant issues—*Queen v. Shearwood* (1) and *Seton v. Arrathoon* (2). The following cases were also cited to show the plaintiff's right to recover: *Standish v. Ross* (3), *Johnson v. Johnson* (4), and *Richardson v. Williamson* (5). Here the parties can be put in *statu quo*. As to the power of Courts of Equity to relieve for mistakes in law, see *Stone v. Godfrey* (6).

Mr. *Branson* for the respondent.—The plaint only states that the writ does not run into Oudh, but does not disclose any actual want of jurisdiction. The defendant does not admit that the writ was not operative in Oudh. The learned counsel contended that the plaintiff had no cause of action whatever, and cited *Clarke v. Lamb* (7), and *Sowdamini Chowdhraïn v. Krishno Kishore Poddar* (8); and relied also on the case of *Ram Tuhul Singh v. Biseswar Lal Sahoo* (9), in which the Privy Council, reversing the decision of the High Court, decided that a purchaser is not entitled to be relieved from his bargain, and get back his purchase-money, merely because the subject of his purchase has become worthless by the happening of an event which he knew might happen when he purchased. That case is directly applicable to the present. [GARTH, C.J., to the *Advocate-General*.—Is there any authority for an action of this kind, of a person wronged by a Sheriff's sale suing the execution-creditor for his purchase-money?]

The *Advocate-General* in reply.—It is submitted that *Johnson v. Johnson* (4) is an express case in the plaintiff's favor. The injury done to his property by the Sheriff's sale gave the plaintiff his right to sue. The case of *Ram Tuhul Singh v. Biseswar Lal Sahoo* (9) was wholly different. That was a case of a subject of litigation being publicly put up for sale, and bought wholly at the purchaser's risk. The parties can be put into

(1) 2 T. & B., 71.

(2) *Id.*, 81.

(3) 3 Ex., 527.

(4) 3 B. & P., 162.

(5) L. R., 6 Q. B., 276.

(6) 1 Sm. & Giff., 590; S. C. on appeal, 5 De G. M. & G., 76.

(7) L. R., 10 C. P., 334.

(8) 4 B. L. R., F. B., 11.

(9) 15 B. L. R., 208.

the same position except so far as it has been altered by the fault of the execution-creditor. The injury was entirely caused by the course he took. Even assuming he is an innocent party, and that there was a mere mistake, then of two innocent parties the one to suffer should be he who instituted the proceedings which caused the mistake.

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Cur adv. vult.

The judgment of the Court was delivered by

GARTH, C.J. (who, after stating the former presentation of the plaint and its rejection, and subsequent admission in appeal, continued):—The plaintiff, therefore, having had then ample warning, must now be considered as having made the allegations in his plaint as strong and precise as was consistent with truth, and we cannot make any presumption in his favor which the language of the plaint does not strictly warrant.

(His Lordship then stated the allegations made in the plaint and continued):—The learned Judge in the Court below considered in the first place that there is nothing on the face of the plaint to show that the proceedings of the Sheriff and also of the execution-creditor, the present defendant, were not perfectly *bona fide*; and in this we entirely agree. Whatever illegality or irregularity took place appears to have been the result of mistake; and there is nothing to show that any of the parties had the least notion that they were doing anything but what the law warranted.

It is stated, however, distinctly in the plaint, and we must assume it as established, that the Sheriff has no right to execute the writ upon property in Oudh, and we will also assume, though it is not so clearly stated in the plaint as it might be, that the result of the proceedings before the Commissioner was that the sale of the Sheriff was declared to be null and void, and that the plaintiff's testator was thereupon removed and evicted from the property (1).

The question then arises, can the purchaser at a sale by the Sheriff under a writ of *fi fa*, upon being evicted from the property purchased by the execution-debtor, recover the purchase-money which he has paid from the execution-creditor, if it

(1) See note (1) on p. 56.

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should turn out that the Sheriff had no authority to execute the writ at the place where the property was situate?

We are asked by the appellant to consider and decide the case upon the assumption that the Sheriff, in seizing, selling, and conveying the property, was the agent of the execution-creditor; that the execution-creditor was in fact the vendor; and as he had no right whatever to deal with or sell the property, there was a total failure of consideration, and that consequently the money paid to him for the purchase became money had and received to the use of the plaintiff's testator.

The case which appeared to be most strongly relied on in support of this view was *Johnson v. Johnson* (1) but that case is very plainly distinguishable. There a house was sold for £300, and the purchase-money was paid; but before the conveyance was executed the purchaser was evicted for want of title in the sellers; and under those circumstances the purchaser was allowed to recover at law the £300 from the vendor as money had and received to his use. But that was upon the express ground that no conveyance had been executed; and that has always been considered the true ground upon which the case was decided.

But where the conveyance has been actually executed, and the purchaser is evicted by a title to which the covenants in his purchase deed do not extend, it is clear from the authorities that he cannot recover the purchase-money either at law or in equity; see Sugden's *Ven. and Pur.*, p. 549, 14th edition, where most of the authorities are collected; and the case of *Clarke v. Lamb* (2) is to the same effect.

The principle of these cases is directly applicable to the present. The purchaser has the means of enquiring into his vendor's title. He is bound to satisfy himself of the goodness of the title he buys, and to protect himself by proper covenants; and we know of no authority for saying that a purchaser at a Sheriff's sale, who expressly buys only the title and interest that the Sheriff has to sell him, is in a better position than any other purchaser. If he chooses to buy imprudently, he must take the consequences of his imprudence.

(1) 3 B. & P., 162.

(2) 10 L. R., C. P., 334.

But apart from this consideration, which of itself affords in our opinion a complete answer to the plaintiff's claim, there are other objections which present additional difficulties in the way of the plaintiff's succeeding in this suit.

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In the first place, we cannot discover that there was any privity of contract between the plaintiff and defendant which would justify the former in treating the latter as the party who had sold him the property. The fact of the defendant and his attorney having directed the Sheriff to seize the property might have made the defendant answerable in tort to the judgment-debtors for the act of seizure. But it does not follow from this that the Sheriff was the defendant's agent to sell this property, and still less the defendant's agent for the purpose of making a contract and executing a conveyance to any person who might become the purchaser at the sale.

Then again there is the further difficulty, that having regard to the fact of the plaintiff's testator's long continuance in the possession of this property, and in receipt of the rents and profits, it is impossible that, under any circumstances, the plaintiff could sustain a claim against the defendant in the shape which this plaint assumes, *viz.*, a claim for money had and received upon the ground that the consideration has wholly failed. The only conceivable form in which a suit could be maintained under such circumstances would be by a proceeding in the nature of a bill in equity to set aside the sale and conveyance, and praying that an account might be taken in which the receipts and profits realized by the plaintiff's testator on the one hand would be set off against the amount of purchase-money and the outgoings of the property on the other.

For these reasons we consider that upon the plaintiff's own statement he has failed to make out any ground of claim, either legal or equitable, as against the defendant.

The appeal must therefore be dismissed with costs on scale 2.

Appeal dismissed.

Attorney for the appellant: Mr. *Dover*.

Attorney for the respondent: Mr. *Paliologus*.

APPELLATE CIVIL.

Before Mr. Justice Glover and Mr. Justice Romes Chunder Mitter.

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July 5.

IN THE MATTER OF GUNPUT NARAIN SINGH.*

Act VIII of 1859, ss. 92 and 93—Interim Injunction—Suit for specific Performance of Contract to give in Marriage—Hindu Law—Ceremonies of Betrothal.

Sections 92 and 93 of Act VIII of 1859 are not applicable to a suit for specific performance of a contract to give in marriage, and the Court will not grant an interim injunction to restrain the defendant from making another marriage with third person.

Per GLOVER, J.—A suit for specific performance of a contract to give in marriage will not lie: the remedy is an action for damages for breach of the contract. The ceremony of betrothal does not by Hindu law amount to a binding irrevocable contract of which the Court would give specific performance.

THE petitioner instituted a suit in the Court of the Subordinate Judge of Gya against Mussamut Rajan Kooer, widow of Baboo Pertab Narain Singh, and mother and guardian of Mussamut Bacha Kooer, for specific performance of a contract to give her daughter in marriage to Jagat Narain Singh, the minor son of the petitioner, and for obtaining possession of the person of the said Bacha Kooer. The allegation of the petitioner was that the ceremonies of betrothal (*Shagoon* or *Borachaka*) had been performed followed by the ceremony of *tilak*, and that the marriage contract being then irrevocable and complete, the plaintiff was entitled to have the ceremony of *Shoomungalee* or the final ceremony performed, and to obtain possession of the girl. The defendant subsequently entered into negotiations for the marriage of her daughter to another person, and performed certain ceremonies with a view to the celebration of such a marriage. The petitioner therefore applied to the Subordinate Judge of Gya to issue an interim injunction under

* Motion No. 735 of 1875, from an order of the Subordinate Judge of Gya, rejecting an application for injunction, dated the 23rd June, 1875.

s. 93, Act VIII of 1859, to restrain the defendant from celebrating the marriage of her daughter with any other person than the petitioner's son, until the said suit had been determined.

The Judge refused to grant the injunction, on the grounds that s. 93 was not applicable to a suit of the kind; and that by Hindu law, the performance of the ceremony of betrothal was not sufficient to make the contract of marriage complete and irrevocable, and therefore the Court could not, in a suit, brought for a breach of the contract, issue an injunction to restrain the defendant from giving her daughter to any else. He referred to Macnaghten's Hindu Law, p. 60; Cowell's Lectures on Hindu Law, 1870, p. 163, last para., and authority cited in note; Shama Charan's Vyavastha Darpana, pp. 646—648, and particularly Vyavasthas 386 and 387, and *Umed Kika v. Nagindas Narotamdas* (1).

The petitioner thereupon applied to the High Court by a petition setting forth the above facts, and praying for a rule calling on Rajan Kooer to show cause why the order of the Subordinate Judge should not be set aside, and the injunction asked for issued.

Baboo *Kalimohun Doss* (with him Baboo *Huyrihar Nath*) for the petitioner contended that, after betrothal, the marriage contract was valid and binding; that consequently a suit could be brought to enforce such a contract, and that in such a suit an injunction might be granted as prayed for. He referred to Menu, ch. iii, v. 43; ch. viii, v. 227; ch. ix, vv. 47, 71 and 99; 1 Macnaghten's Hindu Law, p. 58; 1 Strange's Hindu Law, p. 37; Colebrooke's Digest, vol. ii, pp. 482, 484, 485, vv. 165 note, 169, 170 note, 171 and note.

The following judgments were delivered:—

GLOVER, J. (after shortly stating the facts, continued):—Against this order the petitioner has appealed, and in support of his contention Baboo *Kalimohun Doss* has drawn our attention to certain texts of Hindu law as set out in Menu,

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to show that betrothal is really a marriage, and that a girl once promised to a particular man could not be given in marriage to another; we have also been referred to 1 Strange's Hindu Law, Macnaghten's Hindu Law, and Colebrooke's Digest.

The right of the petitioner to have an injunction *pendente lite* depends on the nature of the remedy which a Civil Court would give in the suit, and if it could be shown that a decree for a specific performance would necessarily follow proof of the petitioner's betrothal to the girl, an injunction might properly be granted, as without it the suit might, and very probably would, be infructuous.

But I agree with the Subordinate Judge that s. 93, Civil Procedure Code, was never meant to apply to cases like this. As a general rule, a decree for specific performance of a contract is given only where an award of damages would be an incomplete relief, and the breach of promise to marry or to give in marriage is one to which a money penalty has in England at least (1) always been considered adequate. And if the matter is to be settled on the principles of equity and good conscience, it can hardly, I think, be said that the Courts in this country should interfere to enforce a marriage between parties one of whom is unwilling, whilst the other can obtain a money remedy for his disappointment. The authorities which have been quoted in support of the arguments that Hindu law demands the carrying out of a marriage when certain anterior ceremonies have been performed, do not, it seems to me, go farther than to declare it morally wrong to break such engagements.

I have not been able to discover any case like this decided on this side of India (2), but the question was very fully discussed in the Bombay High Court in the case of *Umed Kiha v.*

(1) In *Jogeswar Chakrabatti v. Chowdhry v. Mahabat Ali*, 13 B. L. Panch Kauri Chakrabatti, 5 B. L. R., R., App., 34, where the remedy for 395, it was held that, on breach of a breach of a contract to give in promise to give in marriage, a suit to marriage is discussed.

(2) See a reference to the point in *Nowbut Singh v. Mussamat Sad* see per Markby, J., in *Asgar Ali Koor*, 5 N. W. P., H. C. Rep., 102.

Nugandas Narotamdas (1), and it was there decided that the Court would not order specific performance (the girl not being a party to the suit), or compel the father to carry out a marriage with the person to whom the daughter had been betrothed. The Court also held that a betrothal was not, according to Hindu law, an actual and complete marriage. It was shown in that case that there was no precedent for the contention that specific performance had ever been decreed in cases like the present. The authorities quoted (five cases in all), not going beyond this, that, in case the promise was not carried into effect within a certain limited period, the defendant should pay a certain sum by way of damages.

I quite agree with what the learned Judges of the Bombay High Court say on this point, and the absence of any authority in favor of the petitioner points strongly to the conclusion that such a case as this has never been considered one in which anything more than a money award of damages should be decreed.

The Case of *Aunjona Dasi v. Prahlad Chandra Ghose* (2) does not seem to apply. In that suit it was held that a suit by a Hindu mother to declare the marriage of her daughter with the defendant was null and void would lie in the Civil Court. I was of a contrary opinion at the time; but granting that such a suit will lie, how does that affect the present case? It is not averred by the petitioner that his marriage was ever actually completed.

With regard to the effect of betrothal, the reference made to the Vyavastha Darpana applies to Bengal only; but even there, according to the authorities quoted in Vyavastha 386 (p. 646), betrothment is not considered marriage irrevocable; for, as a matter of fact, a girl betrothed to a man, who dies before actual and complete marriage, can afterwards be married to another man, and this seems a complete answer to the allegation.

The judgment of the Bombay High Court refers to the Mitakshara, and that is the law which applies to the case before us. By that law, ch. ii, s. 11, v. 27, retractation of betrothal is punishable by a fine to the king, and may in some cases be made

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(1) 7 Bom. H. C. R., O. C., 122.

(2) 6 B. L. R., 243.

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without any penalty, provided good cause be shown, and one, if not the only, good cause, is said to be the coming of a "preferable suitor."

It appears to me, therefore, that as the plaintiff would fail in a suit for specific performance of the marriage (I do not wish to prejudge matters, but that is my opinion), he ought not to obtain an injunction to prevent the girl's guardian making other matrimonial arrangements. I think that the Subordinate Judge was right, and that this application should be refused.

MITTER, J.—Without expressing any opinion upon the question, whether a suit of this nature will lie or not, I also think that this application ought to be refused. I reject it upon the grounds that the matter does not come within the purview of either s. 92 or s. 93 of Act VIII of 1859; and, if it did, the petitioner should not be allowed to question the order of the lower Court in this form, when he has under the law the right to appeal in a regular way.

Appeal dismissed.

ORIGINAL CIVIL.

Before Mr. Justice Phear.

IN THE MATTER OF OMRITOLALL DEY.

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Sept. 9.

Small Cause Court, Calcutta, Constitution of—Act IX of 1850 and Act XXVI of 1864—Writ of Habeas Corpus, Return to—Privilege from Arrest—Witness—Undertaking by Prisoner not to sue.

The Small Cause Court in the Presidency town is not a Court of co-ordinate jurisdiction with the High Court, but a Court of inferior jurisdiction and subject to the order and control of the High Court. Therefore, where on a prisoner being brought up to the High Court on a writ of *habeas corpus ad subjiciendum*, the return of the jailor stated that the prisoner was detained under a warrant of arrest issued in execution of a decree of the Small Cause Court. *Held*, that the return was not conclusive, but the prisoner was entitled to show by affidavit that he was privileged from arrest at the time he was taken into custody (1).

(1) As regards the question whether *Gunesh Sundari Debi*, 5 B. L. R., the truth of a return can be contro- 418; and *In the matter of Khattija* verted by affidavit, see *In the matter of Bibi, Id.*, 557.

Held, also, that on the facts shown in the affidavit the prisoner was privileged at the time of his arrest.

The prisoner was required before his discharge to give an undertaking that he would bring no action for damages for illegal arrest or false imprisonment against the Judges of the Small Cause Court, the bailiff, the jailor, or the judgment-creditor.

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On the petition of Omritolall Dey, a prisoner in the Presidency Jail, a writ of *habeas corpus ad subjiciendum* was issued by the High Court, directed to the Superintendent of the Jail, ordering him to bring the prisoner before the Court. On the return to the writ it appeared that Omritolall Dey had been committed to custody by virtue of a warrant of commitment to the following effect:—
“In the Calcutta Court of Small Causes. Between Samuel Cross, plaintiff, and Hurrloll Dey and Omritolall Dey, defendants. To the Superintendent of the Presidency Jail. Omritolall Dey is hereby committed to your custody in execution for the sum of Rs. 513-4 debt and costs at the suit of Samuel Cross, ordered and decreed by the said Court on 13th March, 1874, to be paid to the plaintiff above named, with the costs of execution thereof, and you are hereby required to detain him in safe custody for three months, or until he shall perform the said order. Given under the seal of the Court this 2nd July, 1875.”

The Superintendent of the Jail also certified in the return that Omritolall Dey was not in custody under any warrant other than that above set out; and that that was the sole cause of his detention.

Notice was given to the Judges of the Small Cause Court and to the judgment-creditor of the grant of *habeas corpus*, and of the grounds on which the prisoner intended to apply for his release. Those grounds were stated in an affidavit filed by the prisoner to the following effect:—

That since April, 1873, he had acted and was still acting as the general agent of his father Radhanath Dey in the management and conduct of his business and affairs: that on or about the 18th of June, 1875, Notobur Chunder and Nettrololl Chunder instituted a suit in the Calcutta Court of Small Causes against his father Radhanath for the recovery of Rs. 16-4, for rent alleged to be due to them by Radhanath in respect of

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a piece of land situate at Aheereetollah in Calcutta: that the writ of summons was duly served on him: that the claim of the plaintiffs in the suit being disputed, and they having omitted to join other persons as parties thereto, he on behalf of his father and as his agent, and also under a subpoena issued and directed to him at the instance of his father in said suit, attended before the Third Judge of the Small Cause Court on the 25th day of June, 1875, being the day fixed for the trial of the said suit by the summons; and on the suit being called on on that day he appeared on behalf of his father with the leave of the Court, and took an objection to the plaintiffs' proceeding with the suit, on the ground that the addition of another party plaintiff was necessary in the suit, which objection was allowed and the hearing of the suit adjourned until 2nd July; that on the 2nd day of July last, he, as the agent of his father and on his behalf, and by virtue of the subpoena, attended the Small Cause Court between the hours of 11-30 and 12 for the purpose of defending the suit as the agent of his father, and giving evidence as a witness on behalf of his father, and the case being on the postponed board, and a defended suit, he did not expect it would have been called on for trial before 12 o'clock; that on his arrival in the Third Judge's Court he found that the Judge was trying the undefended cases, and he therefore went downstairs in search of his pleader, Mr. Ross, in order to instruct him to defend the suit, but could not find him, whereupon he again came upstairs and took his seat in the Court of the Third Judge, waiting for the suit to be called on, and after having waited there until 3 o'clock or a little after, he enquired of the interpreter of the Court when his father's case would be called, and was told that the case had been already decided *ex parte*; that on receiving this information he delayed a few minutes, considering what to do; but before the Third Judge returned from tiffin he left the Court and immediately came downstairs to proceed home, and as soon as he had left the main gate of the Small Cause Court premises and was going towards his house, he was arrested in Bankshall Street by a native bailiff of the Court at about 3-30 P. M.; that he had no other business to transact in the Small Cause Court

on 2nd July, nor did he go there for any purpose except that of defending the suit, and giving evidence as a witness; and that from the time he went to the Court on that day until he came into the street to go home, he did not leave the Court premises.

The prisoner also stated in his affidavit that he had both on the day of his arrest and subsequently made various applications for his release to the Judges of the Small Cause Court on the ground that at the time of his arrest he was privileged, but the applications had been refused. The affidavits of Mr. Gasper and Mr. Coello, pleaders of the Small Cause Court, were also filed, and corroborated the prisoner's statements as to his being in Court and as to the time of his arrest.

On the prisoner being brought up under the writ of *habeas corpus*, Mr. R. Allen, on his behalf, applied for his release, and the question arose whether the return to the writ was conclusive, or whether it was open to the prisoner to show by affidavit that he was, as a matter of fact, privileged from arrest at the time he was taken into custody.

Mr. Allen submitted that the question depended on the position in which the Small Cause Court stands in relation to the High Court. The Small Cause Court is in the same position with respect to the High Court as the County Courts are to the Courts at Westminster under 9 and 10 Vict., c. 95; and the Indian Act, IX of 1850, is in fact moulded on that Statute.

By the Charter of the Supreme Court the Court of Requests was declared (by s. 21) to be subject to the order and control of the Supreme Court in such sort manner and form as the inferior Courts in England are by law "subject to the order and Control of the Court of King's Bench." As to the history and constitution of the Court of Requests, see Morley's Digest, Intro., 25, and Temple's Small Cause Court Practice, Intro., 1.

The same power as the Supreme Court possessed was continued to the High Court by s. 9 of the Act abolishing the Supreme Court and establishing the High Court, 24 and 25 Vict., c. 104, which enacts that "save as by the Letters Patent may be otherwise directed, and subject to the legislative powers

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of the Governor General in Council, the High Court shall have and exercise all jurisdiction and every power and authority whatsoever in any manner vested in any of the Courts abolished under this Act at the time of the abolition of such last-mentioned Courts."

Neither the Letters Patent nor any subsequent legislation has in any way altered the jurisdiction. Act IX of 1850 did not abolish the Court of Requests: the preamble states that the Act is intended to "amend the constitution and practice and extend the jurisdiction" of that Court, and the name is changed to "Small Cause Court." The Small Cause Court is, if anything, more intimately connected with the High Court than was the Court of Requests with the Supreme Court. By s. 11 the Judges of the Supreme Court might exercise all the powers of a Judge under the Act. S. 35 exempted the Governor General, Members of Council, Judges of the High Court, &c., from arrest or imprisonment under process issuing under the Act. And with respect to this privilege an anomaly would arise if the power which it is desired the High Court should exercise in the present case does not exist, for the privilege from arrest of any of the persons exempted might be nullified if it should happen they were arrested, and the Judge of the Small Cause Court should be actually ignorant of or refuse to recognize their rank and position and cause them to be imprisoned. By s. 41 the rules made by the Judges of the Court were to be subject to approval of the Supreme Court. See also ss. 54 and 55 relating to the reference of questions to the Supreme Court.

Act XXVI of 1864 gives the same jurisdiction to the High Court with respect to the Small Cause Court as was exercised previously by the Supreme Court. For instances of the exercise of that Court's jurisdiction, see *The Queen v. The Judges of the Small Cause Court* (1); *In re the Judges of the Small Cause Court* (2). The High Court then, having the same power as the Supreme Court had with respect to the Small Cause Court, it is apparent that it is a Court of superior

(1) 2 T. & B., 4.

(2) 2 T. & B., 57.

jurisdiction to the Small Cause Court, and not a Court of co-ordinate authority (1).

It is submitted, therefore, that the High Court has power in this case to go behind the commitment, and inform itself by looking at the affidavits of such facts as do not appear on the commitment, so as to enable it to do complete justice. For this there is authority in the English cases; see *Gardener's case* (2), *Goldswain's case* (3), *Ex parte Dakins* (4), *Ex parte Eggington* (5).

On the facts of this case, as stated in the affidavits, it is submitted the prisoner shows his privilege from arrest when he was taken into custody, and that he is entitled to be released.

PHEAR, J.—The prisoner Omritolall Dey has been brought before this Court in obedience to a writ of *habeas corpus ad subjiciendum*. The return to the writ is that Omritolall Dey was received into the custody of the Superintendent of the Presidency Jail under and by virtue of a warrant of commitment to the following effect (reads warrant of commitment, *ante*, p. 79), and that he is detained under the authority of this commitment, and for no other cause.

The affidavits which have been filed on behalf of Omritolall Dey disclose facts which, if they are true, show that when Omritolall was taken by the bailiff he was privileged from arrest, and that therefore the commitment was illegal. It follows that as the jailor shows no other cause for detaining his prisoner the detention is illegal, and he ought to be discharged. The commitment, however, purports to be a commitment made by the Court of Small Causes by way of execution of its own judgment in a civil suit, and therefore a commitment such as that Court had power to make.

(1) See *Pirbhai Khimji v. The Bom. High Court* within the meaning of cl. Bar. & C. I. Ry. Co. (8 Bom. H. C., O. 13 of the Letters Patent C., 59), in which it was held that the (2) Cr. Eliz., 821.
Bombay Court of Small Causes is sub- (3) 2 W. Bl., 1207.
ject to the superintendence of the (4) 1 Jur. N. S., 378.

(5) 18 Jur., 224.

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The first question then is,—Can the validity of the commitment made by the Small Cause Court, which is good on the face of it, be inquired into by this Court, and the facts investigated which, so to speak, lie behind it, and seem to render it illegal. The answer must be in the negative if the Small Cause Court is a Court of co-ordinate authority with this Court, or if it is altogether independent of this Court's jurisdiction. Each of the superior Courts at Westminster refrains from inquiring into the legality of imprisonment imposed under color of process issuing out of any other of those Courts, for the simple reason, as I apprehend, that the latter Court, that is the Court from which process issued, has equal power and authority with itself to finally judge of and determine upon the right and justice of the matter, and therefore is the Court to which the person aggrieved ought to go, and by whose decision he will be bound. It will be otherwise, however, if the Small Cause Court is an inferior Court, and subordinate to the control and authority of this Court.

Now I apprehend that the Small Cause Court does not stand in any superior position, relative to this Court, to that in which the former Court of Requests stood towards the late Supreme Court. It certainly does not occupy a position of greater independence than the Court of Requests did; and is more nearly associated with this Court than was the case between the Court of Requests and the Supreme Court. The Charter of the late Supreme Court (s. 21) runs thus:—"And to the end that the said Court of Requests erected and established at Fort William in Bengal by the said Charter of our said Royal grandfather made in the 26th year of his reign, and the Justices, Sheriffs, and other Magistrates thereby appointed for the said districts, may better answer the ends of their respective institutions and act more conformably to law and justice, it is our further will and pleasure, and we do hereby further grant, ordain, and establish, that all and every the said Courts and Magistrates shall be subject to the order and control of the said Supreme Court of Judicature at Fort William in Bengal in such sort manner and form as the inferior Courts and Magistrates of and in that part of Great Britain called England are by law subject

to the order and control of our Court of King's Bench: to which end the said Supreme Court of Judicature at Fort William in Bengal is hereby empowered and authorized to award and issue a writ or writs of *mandamus*, *certiorari*, *procedendo*, or error, to be prepared in manner above-mentioned, and directed to such Courts or Magistrates as the case may require, and to punish any contempt of a wilful disobedience thereunto by fine and imprisonment."

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I need hardly say that the powers thus given were constantly exercised by the Supreme Court during the period of the existence of the Court of Requests. In 1850, by Act IX of that year, the Court of Requests was developed and converted into the present Court of Small Causes. Its constitution was amended, its jurisdiction in certain respects extended, its practice was regulated, and its name was changed, but it still remained an inferior Court, and the Supreme Court frequently, when occasion required, controlled its orders and directed its discretion by means of writs of *mandamus*, *certiorari*, prohibition, and so on, in precisely the same way as it had when the Court was called the Court of Requests. Mr. Allen, in his very clear argument on behalf of the prisoner, well pointed out that Act IX of 1850 was moulded on the English County Courts Act 9 & 10 Vict., c. 95, and its effect was to place the Courts of Small Causes much in the same situation in relation to the Supreme Court as the County Courts stand to the superior Courts at Westminster. There are differences no doubt in the two cases, but they do not, as it appears to me, tend to give the Small Cause Court any greater independence. Act XXVI of 1864, which extended the jurisdiction of the Small Cause Court, also expressly placed the High Court in the same position with regard to it as the Supreme Court had previously occupied; and lastly, s. 9 of the Charter Act—I need not read it at length—continues to the High Court all the powers and authority of the Supreme Court, subject only to such limits thereto, if any, as might be put by the Queen's Letters Patent to be issued under that Act, or by legislative enactment on the part of the Indian Government. Neither of these authorities has, as I understand, prescribed any such limits of authority by the High Court over the Court of Small Causes.

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I think, then, that this Court has power to examine into and determine on the validity of orders of the Small Cause Court which are brought before it regularly for that purpose. And I may add that if this Court could not on a return to a *habeas corpus* like that which is now made go behind the commitment of the Small Cause Court, the result would be most anomalous: the very purpose, namely, the protection of the liberty of the subject, for which this Court, as the Court of ultimate authority and resort, exercises the power of causing any one who is in confinement within the limits of its original jurisdiction to be brought before it, would be defeated. I will venture to put a case—a somewhat extreme case I admit, but still a case which was apparently within the anticipation of the framers of Act IX of 1850. S. 35 of that Act says—"The Governor-General and Members of the Supreme Council of India, the Governors and Members of Council of the Presidencies of Fort William in Bengal, Fort St. George, and Bombay, respectively, and the Chief Justices and Judges of these several Supreme Courts established therein by Royal Charter shall not be liable to arrest or imprisonment by process issuing out of any Court holden under this Act, and no writ or process shall be sued out of the said Court against any of the persons privileged by Act I of 1844, or Act XVIII of 1848, without the consent of the Governor in Council." Suppose a gentleman, newly made a member of the Supreme Council, had the misfortune to have a judgment of the Court of Small Causes passed against him, and to be arrested by his judgment-creditor, and suppose the Fifth Judge of the Small Cause Court, on his being brought before him for commitment, altogether disbelieved the assertion made by him as to his rank and privilege, and forthwith committed him to prison. Would this Court, on his claiming his discharge, and being brought here on *habeas corpus*, be obliged to say—"It is true we have issued this writ by virtue of the authority which enables us, as the Court of highest jurisdiction in this country, to take care that no one is illegally confined within the limits of the original jurisdiction of this Court, and it is true we have conclusive evidence before us that you are illegally imprisoned by reason of the privilege from arrest conferred on you for purposes

of public expediency; but the Fifth Judge of the Small Cause Court has thought fit to commit you to prison, and we cannot release you?" I think that it can hardly be considered a right state of things that the superior authority of this Court should be thus fettered and rendered vain in the matter of personal liberty.

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We have, moreover, the precedent set by the Court of Common Pleas in a very analogous case to the present—*Ex parte Dakins* (1). In that case the prisoner "having been brought up by a *habeas corpus ad subjiciendum* directed to the keeper of the county jail of Derbyshire, it appeared on the return made to the writ that a judgment had been obtained against him as defendant in an action for debt in the County Court of Derbyshire, and that having been afterwards summoned before the said County Court touching the non-payment of the said judgment-debt, and not having appeared in obedience to such summons, he had been committed by the Judge for such default to the said prison for forty days, or until he should be discharged out of custody by leave of the Judge." Serjeant (afterwards Mr. Justice) "Byles moved that the prisoner should be discharged out of custody on the ground of his being privileged from arrest as one of the Queen's priests in ordinary." In the course of the argument Jervis, C. J., said—"The return shows on the face of it a good cause of detainer; there is then no privilege, and the application should be to the inferior Court." But Serjeant Byles answered:—"The privilege appears in the affidavits on which I move, and they may be used to explain the return: *Ex parte Eggington* (2). In that case Lord Campbell, C. J., says—'Although the return is good on its face, it is competent to show by affidavit the fact that the arrest took place on a Sunday. If such a course were not allowed, that or any other privilege from arrest would be wholly unavailing, as the fact upon which it rests would not appear in the return.'"

In giving judgment, Jervis, C. J., said—"Although I have had considerable doubts during the argument, yet on the whole I am now of opinion that the applicant is entitled to his

(1) 1 Jur., N. S., 373.

(2) 18 Jur., 224.

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discharge." Again, after discussing an objection which had been raised, that the privilege did not extend to the commitment made in that case, as it was one in the nature of a punishment, and not in the nature of an execution, the Chief Justice, deciding that it was in the nature of an execution, said—"This seems therefore to me not to be a case in which the privilege is taken away, but that the case is the same as if the application were made to one of the superior Courts for a discharge from an imprisonment under the process of that Court. But then it is said that if that is so, still the application to discharge the defendant ought to be made to the County Court, which Court alone has power to discharge him; that the defendant has mistaken his remedy and should apply for relief to the Court out of which the process under which he is detained was issued, and that he would then be discharged either on summary application to the County Court, or he can sue out his writ of privilege, but no summary application can be made to the County Court. Then the defendant is being illegally detained, What is his remedy? The ordinary one by *habeas corpus* disclosing on the return the reason of his detainer, and assisted by affidavits, if necessary, to show why the detainer is illegal, as was held in *Ex parte Eggington* (1). And then we have the authority of the case before Patteson, J., in which a servant of the Queen, in custody under a similar commitment, was discharged by this mode on the express ground of privilege." Cresswell, J., said—"I am of the same opinion," and, after referring to the argument, "this therefore shows that this is a commitment in execution for non-payment of the debt, and not as a punishment on contempt. Then as to the mode in which this privilege is to be enforced, it is suggested that the defendant ought first to go to the County Court before we can interfere; but the decision of Patteson, J., is sufficient authority to my mind for granting the present application." The other Judges, Williams, J., and Crowder, J., took precisely the same view.

I may remark that in the present instance the preliminary

objection cannot be made, for the prisoner has applied to the Small Cause Court, but has not there succeeded in obtaining his discharge. The cause of his failure does not appear. It may be that the Court thought it was *functus officio*, and had no power at the stage which the matter had then reached to order his discharge. However this may be, there seems to be no reason why he should not now have recourse to the ultimate authority of this Court, if the facts are such as to justify this Court in interfering.

The affidavit of the prisoner himself states [*reads affidavit*].

A similar question of privilege was raised before me in the late case of *Wooma Churn Dole v. Teil* (1). I there was of opinion on the facts that the prisoner was not entitled to the privilege he claimed, and that the whole case showed an obvious device contrived for the purpose of protecting the prisoner daily for a considerable period on his way to and from his place of residence out of Calcutta and his place of business in Calcutta. The case in which he was subpoenaed was not at the time on the board of this Court for trial, and Mr. Teil had no cause to think either that it was or that it would soon be so; on the contrary he had every cause to know that it certainly would not come on for trial on the day when he was arrested. It seems to me that the facts disclosed in the affidavits in the present case differ altogether from the facts of that case. Here there was a suit actually fixed and pending for trial in the Small Cause Court on the 2nd July, in which Omritolall Dey was subpoenaed to appear as a witness, and in which his appearance seems to have been necessary. He had on the former occasion, when the same case was adjourned to the 2nd, acted for his father in that suit, and had taken part in the proceedings to the knowledge and with the permission of the Third Judge. This case was not only pending, as I have said, but was in fact heard and determined as an *ex parte* case on that very day, only, so far as I can see, two or three hours at the utmost before Omritolall Dey was arrested. It seems to me on the affidavits to be beyond the possibility of contest that the prisoner was attending the Court of Small Causes on that day for the purposes of that suit, and that it was right he should be there. It may be

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(1) 14 B. L. R., App., 13.

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open to question whether he stayed longer in Court after he learnt that the case was over than was absolutely necessary. According to his own account he did not. But even supposing he did, then, on the authority of numerous English decisions, that fact alone did not take away his privilege from arrest. Even if he had delayed to some extent in going from the Court to his house, he might well enough, within the decided cases, have nevertheless not lost his privilege. But this did not happen; he was arrested almost as he stepped over the outer threshold of the Court. I take these facts as they are placed before the Court on the prisoner's affidavits, because on the authority of *Ex parte Dakins* (1), as I have already mentioned, it is not only justifiable but absolutely necessary in a case of this kind that the Court should look at affidavits to ascertain all the necessary facts not disclosed by the commitment itself. The ruling of the Court of Common Pleas in *Ex parte Dakins* (1), which is directly applicable, relieves me from the necessity of examining the long list of cases from *The Queen v. Bolton* (2) downwards, which illustrate the principle which must govern the superior Court on this point. I may mention however *Bailey's* case (3) as a very strong authority the same way. The judgment creditor and also the Judge of the Small Cause Court have had notice of this application, and of the grounds on which it is made; but no affidavits have been filed, nor any statement of facts presented to this Court in opposition to the affidavits filed on behalf of the prisoner. I must therefore take the facts disclosed in these affidavits as being substantially the facts of the case. One of these affidavits, made by Mr. Gasper, a disinterested person, entirely confirms the account of the prisoner as to the time of the day when the occurrence took place.

On these facts, then, it appears to me that the prisoner was privileged from arrest when he was taken by the bailiff; that he was therefore wrongly committed to prison by the Small Cause Court, and that the return to the habeas corpus made to the High Court in this case, when inquired into, does not justify his detainer.

(1) 1 Jur., N. S., 378.

(2) 1 Q. B., 66, 72.

(3) 3 E. & B., 607, 618.

There still remains a point to be considered. On a comparison of dates, it appears that the arrest and commitment took place two months ago, and unless this interval had been accounted for, this Court would not interfere on habeas corpus. It is incumbent on the applicant in a case of this kind to come at once to the Court without delay. But I find in that part of the affidavit of the prisoner which I have not read out that this time was consumed by fruitless applications to the Small Cause Court for release. I am therefore of opinion that the delay does not serve to disentitle the applicant to his discharge. There is, however, one condition I must impose on him. The privilege he sets up is for the benefit of the public, and not for his own personal advantage; and I think I ought therefore to require of him that he bring no action for damages for illegal arrest or false imprisonment against the Judges of the Small Cause Court, the bailiff, the jailor, or the judgment-creditor (1).

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Mr. *Allen* on behalf of the prisoner states that he is instructed by the prisoner to give that undertaking.

PHEAR, J.—Let the prisoner be discharged.

Application granted.

Attorney for the prisoner: Mr. *Camell*.

(1) As to the right to bring an action Court, see *Cameron v. Lightfoot*, 2 W. Black, 1190, and *Stokes v. White*, 1 C. M. & R., 223.

APPELLATE CIVIL.

Before Mr. Justice L. S. Jackson and Mr. Justice McDonell.

1875
May 19th.

DEEN DOYAL PORAMANICK (DEFENDANT) v. KYLAS CHUNDER
PAL CHOWDHRY AND OTHERS (PLAINTIFFS).*

Contract—Hindu Law—Interest.

The rule of Hindu law, prohibiting the recovery of interest exceeding in amount the principal sum lent, is not applicable to suits brought in Mofussil Courts in Bengal.

Suit to recover Rs. 14,320-2-15, alleged to be due upon a mortgage bond, executed by the defendant in the plaintiff's favour on the 28th Baisakh, 1274. Of this sum, Rs. 5,000 were claimed as principal, and the balance as interest. By the bond sued upon, the defendant agreed to pay "interest at the rate of Rs. 1-8 per cent. per mensem up to the realization" of the principal sum, to repay the principal and interest in or before the month of Choitro, 1275 (March, April, 1869); that the interest should be paid half-yearly on the 30th of Aswin and the 30th of Choitro: and that, in case of default in the said payment, the unpaid interest was to be added to and considered principal, and was to carry interest at the same rate as the principal. The defendant having made default, the plaintiffs, after having made several demands, brought this suit on the 6th December, 1873.

The defendant contended, amongst other things, that interest at the stipulated rate would only run from the 28th Baisakh to the end of Choitro, 1275; that interest exceeding in amount the principal could not be recovered; and that the amount claimed was excessive.

The Judge having decreed the suit in the plaintiff's favour, the defendant appealed to the High Court.

* Regular Appeal, No. 127 of 1874, against a decree of the Officiating Judge of Zilla Nuddea, dated the 2nd March, 1874.

Mr. C. Jackson (*Baboo Hurry Mohun Chuckerbutty with him*)
for the appellant.

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Baboos *Mohini Mohun Roy* and *Rash Behary Ghose* for the
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Mr. C. Jackson.—The plaintiffs cannot, under the terms of the bond, recover anything in respect of interest accruing after the due date thereof. Both the plaintiffs and the defendant being Hindus, the Hindu law should be applied, under which a creditor cannot recover from his debtor more than the money lent, and a similar amount for interest; Menu, ch. viii, v. 151—*Khushalchand Lalchand v. Ibrahim Fakir* (1), *Ramkrishnabhat v. Vithoba bin Malharji* (2), and *Ram Lal Mookerjee v. Haran Chandra Dhar* (3.)

Baboo *Rash Behary Ghose* for the respondents.—The law in Bombay is different from the law in Bengal, and the Bombay cases cited are, therefore, inapplicable; and the same observation applies to the last cited case, which was decided upon the law which obtains in Calcutta. In the Bengal mofussil matters of contract between Hindus are not governed by the Hindu law; Regulation IV of 1793, s. 15, and Act VI of 1871, s. 24, limiting the application of that law to suits regarding succession, inheritance, marriage, caste, and religious usages and institutions; and in any case the rule of Hindu law, which forbids the recovery of interest exceeding in amount the principal, is not applicable to mortgage transactions; see *Narayan bin Babaji v. Gangaram bin Krishnaji* (4).

Mr. C. Jackson in reply.

The judgment of the Court was delivered by

JACKSON, J.—The two questions raised in this appeal, which are of most importance, are, first, whether compound interest stipulated by the instrument on which the plaintiffs sue will run beyond the due date, which is the end of Choitro 1275; and secondly, whether, with reference to the Hindu law, the plaintiffs

(1) 3 Bom. H. C. Rep., A. C., 23.

(2) *Id.*, 25.

(3) 3 B. L. R., O. C., 130. See also *Narayan v. Satvaji*, 9 Bom. H. C. Rep., 83, where the authorities are reviewed.

(4) 5 Bom. H. C. Rep., A. C., 157.

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and the defendant being both Hindus, a larger amount of interest than the principal can be recovered. As to the first question, we can have no doubt, I think, that the terms of the bond appear clearly to import that there was to be payment of interest in two instalments,—*viz.*, a half-yearly and yearly payment, the word বৎসরে including not only the particular year which was to elapse before the amount was due, but each year until the whole sum was recovered. As to the second point, no authority has been laid before us to justify our adoption, for Courts in the mofussil, of the rule of Hindu law that more interest than the principal could not be recovered. We are referred to a decision of the Bombay High Court in *Khusalchand Lalchand v. Ibrahim Fakir* (1), but the decision of the Bombay Court appears to have been based upon a legislative enactment in force in Bombay, to the effect that the Courts in that Presidency were, in the absence of any specific Act of Parliament or legislation, to apply the usage of the country, and in the absence of such usage the law of the defendant. In the Presidency town here, no doubt, it has been held that the rule of Hindu law in question has not been abrogated by Act XXVIII of 1855, and that the Supreme Court was, and the High Court is, bound in its original jurisdiction to administer the Hindu law in matters of such contract; but in the case before us the provisions of Act VI of 1871, contained in s. 24, are applicable. According to that section, the rules of Mahomedan and Hindu law are to be administered to parties, Mahomedans and Hindus respectively, only in matters of succession, inheritance, marriage, or caste, or any religious usage or institution. We think, therefore, that there was nothing to prevent the Court below from awarding the amount of interest which is in conformity with the contract between the parties, nor that there is anything to show that the defendant had not entered into this contract with his eyes open, or that there is any equitable ground on which this Court should interfere. The appeal is dismissed with costs.

Appeal dismissed.

(1) 3 Bom. H. C. Rep., A. C., 23.

ORIGINAL CIVIL.

Before Mr. Justice Phear.

THE EAST INDIAN RAILWAY COMPANY v. THE BENGAL
COAL COMPANY.

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Sept. 20, 24,
§ 28.

Jurisdiction—Suit for Land—Letters Patent, 1865, cl. 12—Injunction.

In a suit brought against the owners of a mine adjacent to a mine belonging to the plaintiffs, the plaint alleged that a certain boundary line existed between the two mines, and prayed for a declaration that the boundary line was as alleged, and that the defendants might be restrained by injunction from working their mine within a certain distance from such boundary line. The defendants in their written statement disputed the plaintiffs' allegation as to the course of the boundary line. The mines were situated out of the jurisdiction of the High Court, but both the plaintiffs and defendants were personally subject to the jurisdiction. *Held*, that the suit was a suit for land within cl. 12 of the Letters Patent, and therefore one which, the land being in the mofussil, the Court had no jurisdiction to try.

On the facts stated in the plaint, and before the filing of the defendants' written statement, the Court granted an *interim* injunction, and refused an application to take the plaint off the file.

THIS was described as a suit for declaration of title to certain land and mines, for an injunction and for other relief. It was brought by the owners of certain land and coal mines in the district of Hazareebagh to restrain the defendants, who were the owners of a mine adjacent to that of the plaintiffs, from working their mine within a certain distance from a line alleged by the plaintiffs to be the boundary line between their mine and that of the defendants, on the allegation that such working would be to the injury of the plaintiffs' mine.

The plaint prayed that it might be declared that the course of the boundary line was as stated by the plaintiffs; and that the defendants might be restrained by injunction from working their mine, within a certain distance of the said boundary line, and from allowing the water from their mines to flow into those of the plaintiffs, and from otherwise injuring the plaintiffs' mines. The defendants in their written statement disputed the

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plaintiffs' allegation as to the course of the boundary line, and submitted that the court had no jurisdiction to try the suit. Both the plaintiffs and defendants had their principal offices, and carried on business, in Calcutta.

The plaint having been admitted, an application for an *interim* injunction was granted, and an application subsequently made that the plaint should be taken off the file, on the ground of want of jurisdiction in the Court to entertain the suit, was refused: and the defendants having filed a written statement, the case came on for settlement of issues, and the issue was raised as to whether the Court had jurisdiction to try the suit.

The *Advocate-General*, offg. (Mr. Paul) and Mr. W. Jackson for the plaintiffs.

Mr. Woodroffe and Mr. Branson for the defendants.

The *Advocate-General*.—By s. 9 of the High Courts' Act, 24 & 25 Vict., c. 104, the High Court was to possess the powers of the Supreme Court, except so far as they might be altered by the Legislature. The jurisdiction of the Supreme Court is shown in the Charter of 1774, and extended by s. 13 to all kinds of actions against persons resident in Bengal, Behar, and Orissa; and by s. 17 of 21 Geo. III, c. 70, the Supreme Court had jurisdiction to try all suits against inhabitants of Calcutta. It is submitted then that this is a suit which the Supreme Court would have had jurisdiction to try. By cl. 12 of the Letters Patent, 1865, the powers of the High Court extend to cases of every description in certain cases. Unless it clearly appear that this is a suit for land within the meaning of that clause, this Court has jurisdiction by reason of the defendants being resident in Calcutta. It is submitted the meaning of "suit for land" is "suit for possession of land." The cases which attempt to show that suits for foreclosure and redemption are suits for land are wrongly decided. Such suits are eminently personal suits, and possession is not a necessary element in them—*Paget v. Ede* (1). All suits concerning land

(1) L. R., 18 Eq., 118.

are not suits for land. A suit for trespass to land is not a suit for land—*Rajmohun Bose v. The East Indian Railway Company* (1) and *Halford v. East Indian Railway Company* (2); but the suit may be brought where the person can be found. Here the plaintiffs ask that the defendants may be prevented from committing a trespass to their land. In trying suits with respect to land in the mofussil, this Court regulates its procedure by what would have been the procedure if the suit had been brought in the mofussil—*Bank of Hindustan v. Nundolall Sen* (3). The parties being subject to the jurisdiction, the Court has power to try this suit. The plaintiffs do not seek for an adjudication of title; see *Chintamun Narayan v. Madhavrao Venkatesh* (4) and *Ratanshankar Revashankar v. Golabshankar Lalshankar* (5).

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Mr. Woodroffe for the defendants referred to the description of the suit in the plaint as showing the nature of the relief sought for. It is admitted that the defendants are entitled to work up to the limits of their land, leaving the plaintiffs to protect their mines by leaving a sufficient margin, and that the defendants cannot be restrained from so working. The question, therefore, is what is the line up to which the defendants have the right to work; in other words, is that land the plaintiff's or the defendant's land? For the plaintiffs the argument assumed that the defendant-company was a British subject. It is submitted a suit could not have been instituted in the Supreme Court against a British subject, resident in Calcutta, for land out of Calcutta, when there was no question of contract between the parties; see *Doe d. Hurlall Mitter v. Hilder* (6). No authority has been cited to shew that such a suit was ever brought. Nor since the Letters Patent, can residence be made the ground of jurisdiction, where the land is out of the jurisdiction, and the Court has for that reason no jurisdiction—*Rundle v. The Secretary of State* (7), *Bibee Jaun v. Meerza Mahomed Hadee* (8) *S. M. Lal-*

(1) 10 B. L. R., 241.

(5) 4 Bom. H. C. Rep., A. C., 173.

(2) 14 B. L. R., 1.

(6) Morton, 183.

(3) 11 B. L. R., 301.

(7) 1 Hyde, 37.

(4) 6 Bom. H. C. Rep., A. C., 29.

(8) 1 I. J., N. S., 40.

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money Dasi v. Juddonath Shaw (1), *Blaquiere v. Ramdhone Doss* (2), *Denonath Sreemony v. Hogg* (3), *In re Leslie* (4) and *Bagram v. Moses* (5) was a case of a declaration of trust; the Judge there expressly says he could make no adjudication of title. *Rajmohun Bose, v. The East Indian Railway Company* (6) has no bearing on this case. *Juggoduma Dossee v. Puddomoney Dossee* (7), and *Khalut Chunder Ghose v. Minto* (8) are distinguishable also on the ground that there was no title to land sought to be declared in either. As the Judge says in the latter case (p. 429):—"No right to land, or to any interest therein, will be in the slightest degree modified or affected by the result of the suit." *Paget v. Ede* (9) is a decision by the Court of Chancery, which has power in any case to give a decree to affect the conscience of a defendant. This is a Court of limited jurisdiction. That decision too is contrary to the whole course of decisions in this Court. In *Chintaman Narayan v. Madhavav Venkatesh* (10) and *Ratanshankar Revashankar v. Gulabshankar Lalshankar* (11), the question of title arose only incidentally; there was no question of title between the parties to be decided in the suit. On that point too it was held in *Surwar Hossein Khan v. Shahzada Gholam Mahomed* (12) that a suit to have it declared that lands were charged with the payment of a debt on an unregistered bond for a sum of money in which the lands were charged by way of mortgage and for an order for sale, was a suit for recovery of an interest in immovable property. That was also the ground of decision in *Norris v. Chambers* (13).

The learned Counsel also referred to the case of *Doe d. Colvin v. Ramsay* (14) to which his attention had been called, and distinguished it from the case of *Doe d. Hurlall Mitter v. Hilder* (15), because, in the former case, the defendant

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| (1) 1 I. J., N. S., 319. | (8) 1 I. J., N. S., 426. |
| (2) Bourke, O. C., 319; S. C., on appeal, <i>Eng.</i> , 11th Sep. 1865. | (9) L. R., 18 Eq., 118. |
| (3) 1 Hyde, 141. | (10) 6 Bom. H. C. Rep., A. C., 29. |
| (4) 10 B. L. R., 68. | (11) 4 Bom. H. C. Rep., A. C., 173. |
| (5) 1 Hyde, 284. | (12) B. L. R., Sup. Vol., 879. |
| (6) 10 B. L. R., 241. | (13) 29 Beav., 246. |
| (7) 15 B. L. R., 318. | (14) Morton, 148. |
| | (15) <i>Ib.</i> , 183. |

was a British subject. See also the note by the editor to that case.

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The Advocate-General in reply.—A suit for ejectment from land out of Calcutta has been held to lie in the Supreme Court against a native inhabitant of Calcutta—*Doe d. Bampton v. Petumber Mullick* (1). See also *Doe d. Muddoosoodun Doss v. Mohenderlall Khan* (2) and *Doe d. Chuttoo Sick Jemadar v. Subbessur Sein* (3), therefore the being a British subject, made no distinction. It was attempted to get rid of the case of *Paget v. Ede* (4), on the ground that this Court was of more limited power than the Court of Chancery; but that is not so; although the Supreme Court had power to give possession of land out of Calcutta, the Court of Chancery cannot give possession of land out of England. The case of *Penn v. Lord Baltimore* (5) is an authority against the defendants. It does not matter what the subject of the suit is, provided the Court acting *in personam* has power to compel the defendant to do what it orders. As to the power of the Supreme Court to issue writs out of Calcutta, see *Dorab Ally Khan v. Moheeruddeen* (6) and cases there cited. *Rundle v. The Secretary of State* (7) is not in point. In *Juggodumba Dosee v. Puddomoney Dossee* (8), it was contended that, by appointing a receiver, the Court practically gave possession. Now a different interpretation is attempted to be put upon that case. It is submitted that immediately the defendants reach the boundary line, they will be committing a trespass which the Court has power to prevent in this suit.

Mr. Woodroffe, by permission of the Court, distinguished the case of *Doe d. Bampton v. Petumber Mullick* (1), inasmuch as there the jurisdiction was admitted. *Doe d. Muddoosoodun Doss v. Mahenderlall Khan* (2) does not bear out the contention it was cited to support.

(1) Bign., 24.

(2) 2 Boul., 40.

(3) *Id.*, 151.

(4) L. R., 18 Eq., 118.

(5) 1 Ves. Sen., 446.

(6) *Ante*, p. 55.

(7) 1 Hyde, 37.

(8) 15 B. L. R., 313.

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Mr. Jackson referred to *Doe d. Bampton v. Petumber Mullick* (1), where it is said the power contended for was always possessed by the Supreme Court.

Cur. adv. vult.

PHEAR, J.—It now appears that the object of this suit is not as I supposed at first, to enforce an equity against the defendant-company in regard to the user and enjoyment of its own land: but to use the words of the learned Advocate-General, “the plaintiff asks that the defendant be restrained from passing beyond his boundary and committing a trespass on his, the plaintiff’s land,” and the line at which the plaintiff thus seeks to stop the defendant is not admitted by the latter to be his boundary line. On the contrary the defence is that the defendant’s land extends to a second line considerably beyond that specified by the plaintiff. The sole question in dispute between the parties is, whether the margin or strip of land between these two lines belongs to the plaintiff or to the defendant. The suit is substantially brought to have it declared as against the defendant that this strip belongs to the plaintiff, and it is, therefore, I think, a “suit for land” within the meaning of the 12th clause of our Letters Patent, as it has been interpreted by a long line of cases which it is now too late to question. It is very different from the Howrah case (2), where the only question was, whether defendant, a stranger, was liable for a trespass upon the plaintiff’s land, or a nuisance affecting him in the enjoyment of it, and where there was no question whatever between plaintiff and defendant, as to the plaintiff’s right to the land. And the express words of cl. 12 of the Letters Patent render the principles of the decision in *Paget v. Ede* (3) inapplicable.

The suit must be dismissed for want of jurisdiction with costs on scale No. 2.

Suit dismissed.

Attorneys for the plaintiffs: Messrs. *Chauntrell, Knowles, and Roberts.*

Attorneys for the defendants: Messrs. *Berners, Sanderson, and Upton.*

(1) Bign., 24, at p. 43.

(2) *Rajmohun Bose v. The East Indian Railway Company*, 10 B. L. R., 241.

(3) L. R. 18 Eq., 118.

APPELLATE CIVIL.

Before Mr. Justice Glover and Mr. Justice Mitter.

IN THE MATTER OF THE PETITION OF POONA KOORER.*

1875
Aug. 25.

Act XXVII of 1860—Review.

A review of judgment is admissible in proceedings under Act XXVII of 1860, although no express provisions for reviews are contained in the Act.

A CERTIFICATE under Act XXVII of 1860 was applied for by Mussamut Khatun Koorer, the younger widow of one Toondun Singh, claiming as representative of her husband by virtue of a will in her favor, dated 25th November, 1874.

The Judge refused the application, and from his decision Khatun Koorer appealed to the High Court.

The High Court granted her a certificate, but no order was made as to her giving any security. An application for review of this judgment was made, on the ground that it was defective in making no provision for the taking of security from Khatun Koorer to whom the certificate had been granted: but on the argument of the application, it was objected that a review was not admissible under Act XXVII of 1860, and the provisions of Act VIII of 1859 as to reviews did not apply.

Mr. *Branson* (with him Mr. *R. T. Allan* and Mr. *Mendies*) for Poona Koorer.

Baboo *Moheshchunder Chowdry*, *Bamachurn Banerjee*, *Hem Chunder Banerjee*, and *Probodh Chunder Mitter* for Khatun Koorer.

The judgment of the Court, which was delivered by Glover, J., in so far as it related to the above objection, was as follows:—

GLOVER, J.—Baboo Moheshchunder Chowdry, who has appeared for the opposite party, contends that the law does not

* Application for Review, No. 8 of 1875, against the judgment of Glover and Mitter, JJ., passed on the 22nd of July, 1875, in Miscellaneous Regular Appeal No. 138 of 1875.

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provide for a review in a case like this, and has quoted in support of his argument the case of *Sivu v. Chenamma* (1), in which it appears to be laid down that the provisions of the Code of Civil Procedure regarding reviews of judgment are not applicable to orders passed under Act XXVII of 1860, but there is another case which has been decided in this Court, namely—that of *Hameeda Beebee v. Noor Beebee* (2), in which the contrary has been ruled, and which ruling we think we ought to follow. We see no reason why this Court should not exercise jurisdiction in the matter, and consider the merits of the application for demanding security to be taken from Mussamut Khatun Kooer to whom the certificate has been granted.

Application allowed, but without costs.

Before Mr. Justice Macpherson, Offg. Chief Justice, and Mr. Justice Jackson.

MOWLA BUKSH (ONE OF THE DEFENDANTS) v. KISHEN PERTAB SAHI (PLAINTIFF).*

1875
June 23.

Appeal—Letters Patent, 1865, cl. 15—Act VI of 1874—Order granting Appeal to Privy Council.

Under cl. 15 of the Letters Patent, no appeal lies to the High Court from an order of the Judge in the Privy Council Department, granting a certificate that a case is a fit case for appeal to Her Majesty in Council.

THE plaintiff in this case preferred a petition of appeal to Her Majesty in Council, applied to the High Court for leave to appeal, and obtained a certificate under the provisions of Act VI of 1874 from Markby, J., that the case was a fit case for appeal.

From the order granting the certificate, the defendant appealed under the provisions of cl. 15 of the Letters Patent.

Munshi Mahomed Yusoof for the appellant.

The *Advocate-General*, offg. (Mr. Paul) for the respondent.

The *Advocate-General* raised a preliminary objection that, under the Letters Patent, cl. 15, no appeal lay from an order by a Judge in the Privy Council Department, granting a

* Appeal under cl. 15 of the Letters Patent from the decision of Markby, J., dated 9th April, 1875, in Privy Council Appeal, 9 of 1875.

(1) 5 Mad. H. C. Rep., 417.

(2) 9 W. R., 394.

certificate under the provisions of Act VI of 1874. There is 1875
 no appeal in any case, unless it is expressly given by some ^{MOWLABUKSH}
 enactment. Moreover, Act VI of 1874 directs that, on the ["]
 admission of an appeal, the proceedings shall be sent on at once. ^{KISHEN}
^{PERTAB SAHL.}
 No provision is made there for an appeal, or for any delay for
 the purposes of an appeal.

Munshi *Mahomed Yusoof* contended that an appeal in such
 cases was expressly allowed by the provisions of cl. 15 of the
 Letters Patent. It was an appeal to the High Court from the
 judgment (1) of one Judge of that Court. An appeal being so
 allowed, it was unnecessary to make any provision in Act VI
 of 1874 for allowing an appeal. S. 6 of the Act only takes
 away the right of appeal to the Privy Council in certain
 cases.

The judgment of the Court was delivered by

MACPHERSON, J.—It appears to me that in this case,
 in which a certificate that the case is a fit one for appeal to
 the Privy Council has been granted by the Judge in the Privy
 Council Department, there is no appeal under cl. 15 of
 the Letters Patent. Reading ss. 11 and 12 of Act VI of
 1874, it is clear that an appeal from an order granting a certi-
 ficate was never contemplated. S. 11 provides that the
 proceedings shall go on at once upon the certificate being
 granted, and no provision is made for the delay which neces-
 sarily follows upon an appeal being preferred. It would more-
 over be very inconvenient if there were an appeal under cl. 15
 from these orders. The certificate being once granted,
 it certainly seems very unnecessary that the whole matter
 should be again discussed here before a different Bench. The
 appeal to the Privy Council being admitted, their Lordships will
 have the whole matter before them, and will dismiss the appeal
 if they think it has been improperly admitted.

Appeal dismissed.

(1) As to what is a "judgment" with- C., 10; *The Justices v. The Oriental*
 in the meaning of cl. 15 of the Letters *Gas Company*, 8 B. L. R., 433;
 Patent, see *DeSouza v. Coles*, 3 Mad. *Sonbai v. Ahmed Bhai*, 9 Bom. H. C.
 H. C. Rep., at pp. 387-8; *Raku Bibi v.* Rep., 398.
Mahomed Musa Khan, 4 B. L. R., A.

PRIVY COUNCIL.

P. C.*
1875
June 4 & 5.

BHAGBUTTI DEYI (DEFENDANT) v. BHOLANATH THAKOOR
AND OTHERS (PLAINTIFFS).

[On appeal from the High Court of Judicature at Fort William in Bengal.]

In this case the decision of the High Court (1) was reversed by the Privy Council, who held that the effect of the instruments was to give the widow an estate for life with power to use the proceeds as she chose, and consequently that the proceeds or property purchased by her out of the proceeds would belong on her decease to her heirs. But as the decision turns entirely on the effect of the particular expressions used in the instruments and illustrates no principle of law, no detailed report is now given.

ORIGINAL CIVIL.

Before Mr. Justice Phear.

1875
Sept. 6 & 13.

MOKOONDO LALL SHAW AND ANOTHER v. GONESH CHUNDER
SHAW AND ANOTHER.

Hindu Law—Will—Clause restraining Partition or Enjoyment.

Where a Hindu testator gave all his immoveable property to his sons, but postponed their enjoyment thereof by a clause that they should not make any division for twenty years, *Held*, that the restriction was void as being a condition repugnant to the gift, and that the sons were entitled to partition at once.

SUIT for construction of the will of one Nilmoney Shaw, for an account, for partition, and other relief.

The testator Nilmoney Shaw, a liquor merchant in Calcutta, died on 23rd June 1874, leaving four sons, *viz.*, the defendant Gonesh Chunder, the plaintiff Mokoondo Lall, Promodee Lall

* *Present*:—SIR J. W. COLVILLE, SIR B. PEACOCK, SIR M. E. SMITH,
and SIR ROBERT P. COLLIER.

(1) 7 B. L. R., 93.

since deceased, and the plaintiff Nrigendro Lall an infant, and also a daughter, and one Bosunto Coomaree Dossee, the widow of a son who had predeceased him. He died possessed of considerable moveable and immoveable property, and by his will, dated 16th June, 1874, in Bengali, after appointing his son Gonesh Chunder as his sole executor, he directed that Gonesh Chunder should have the management of all the moveable and immoveable property and the conduct of the business, and that his three other sons should remain joint in food with Gonesh Chunder, who was out of the profits of the business to lay out as long as the sons remained joint Rs. 200 per month for the household expenses; if the sons were unwilling to remain joint, then Gonesh Chunder should get from the profits of the business Rs. 70 per month, and the other three sons the remaining Rs. 130 in equal shares for their respective household expenses. The first paragraph of the will then continued:—"After twenty years from my death my sons will be at liberty to divide and take the aforesaid business, but before the aforesaid twenty years (have elapsed) my sons will not be competent to divide the capital stock or profits of the aforesaid business, and the business will not be made liable for their respective debts. I have appointed my eldest son Gonesh Chunder to carry on the said business; but before the lapse of twenty years from my death, neither he nor any of my other sons shall acquire any rights therein." In the 2nd paragraph of the will, the testator directed a certain sum he had accumulated from the profits of the business to be "thrown into the jumma of the aforesaid business, the two to be divided according to the rule for the aforesaid business after the lapse of twenty years from my death. Before this time my sons shall not be competent to make a division." The 5th paragraph of the will was as follows:—"Whatever other immoveable property, &c., I have besides the said ~~business~~, I give to my sons in equal shares; as soon ~~they~~ wish they may divide and take it in equal shares. But after the lapse of twenty years from my death, my eldest son Gonesh Chunder and his heirs becoming rightful proprietors, will get a 5-anna share of the whole of my aforesaid business and the profits thereof and the property which has been

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1875 purchased with the said profits: of the remaining 11-anna share Mokoondo Lall and his heirs will get a 4-anna share, Promodee Lall and his heirs a 3-anna share, and Nrigendro Lall and his heirs a 3-anna share.”

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The only question material to this report arising on the will was as to the validity or otherwise of the restriction imposed by the testator on the division of his property, by prohibiting any division thereof for twenty years: the plaintiff submitting that it was invalid and inoperative. The defendant submitted that inasmuch as until the lapse of twenty years, the sons were not to acquire any rights in the business, the suit was premature; and that the restriction as to division was not invalid. On the case coming on for settlement of issues, these questions were raised.

Mr. Branson and Mr. Bonnerjee for the plaintiffs.

The *Advocate-General*, offg. (Mr. Paul) and Mr. Macrae for the defendants.—The cases of *Kumara Asima Krishna Deb v. Kumara Kumara Krishna Deb* (1), *Rumdhone Ghose v. Anund Chunder Ghose* (2), *Anund Chunder Ghose v. Prankisto Dutt* (3), *Anath Nath Dey v. Mackintosh* (4), and *Sat-dowree Sein v. Gobind Chunder Sein* (5) were referred to in argument.

PHEAR, J.—The testator directs his eldest son to pay out of the profits of his business Rs. 200 a month for the family expenses of his sons, if they remain living in commensality, or Rs. 70 a month to himself, Gonesh Chunder, and Rs. 43 and odd annas to each of the three other sons if they separate. This is to go on for twenty years, Gonesh Chunder managing the property; meanwhile, if he dies, the next son in succession is to be manager and so on, and the rest of the profits over and above the Rs. 200 per month are directed to be invested and accumulated. Then the

(1) 2 B. L. R., O. C., 11.

(2) 2 Hyde, 97.

(3) 3 B. L. R., O. C., 14.

(4) 8 B. L. R., 60.

(5) 2 I. J., N. S. 56.

testator declares (reads portion of 1st paragraph set out, *ante*, p. 105). Afterwards in the 5th paragraph of the will he says (reads 5th paragraph, *ante*, p. 105).

I entertained some doubts at first whether the passages which I have read amounted to any disposition of the property other than the Rs. 200 a month during the period of twenty years. The words "neither he nor any of my other sons shall acquire any rights therein" seemed to exclude the supposition that they were intended to have any interest in the business during that time, and some of the words of paragraph 5 to some extent confirmed that view. On the other hand, the substance of paragraph 5 seems to contemplate that the property is given at once in specified shares to the sons; and there would be a very considerable inconvenience on the body of the will on any other interpretation. I have come, therefore, to think that the words "neither he nor any of my other sons shall acquire any rights therein" mean rights of immediate enjoyment. The accumulations which are directed to be made and invested are ultimately given to the sons in the same shares as the original property: and on the whole, I think, the true construction of the disposition is that the testator gives all his property in the business to his sons in the shares which are specified in paragraph 5: but postpones their enjoyment of this property for twenty years, subject only to the monthly gift of Rs. 200 to the sons jointly for household expenses, or in the shares I have already mentioned in the event of their living separate. Now, without saying that a Hindu testator might not give the current profits or income of the property to the trustees and direct them to apply this to the payment of debts throughout a specified period, as twenty years, I do not think it is competent to him to give the corpus of the property to an adult person and at the same time to forbid that person from enjoying the property in the way which the law allows. The prohibition against receiving and enjoying the income for twenty years appears to me simply to be a condition imposed on the property which is repugnant to the gift. It is not merely the giving of one portion of the property to one person or purpose, and the remaining portion to another person or purpose: but it is giving the entire property

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to one person and coupling this gift with a prohibition against his enjoyment. The attempt to do this is, I think, void in law. The result is that, on this will as I construe it, the parties to the suit are immediately entitled to the businesses, subject only to the direction with regard to the application of Rs. 200 per month for household expenses. I think, therefore, they are entitled to the partition.

Judgement for plaintiff.

Attorney for the plaintiffs: Baboo P. C. Mookerjee.

Attorney for the defendants: Baboo G. C. Chunder.

FULL BENCH.

Before Sir Richard Garth, Kt., Chief Justice, Mr. Justice Jackson, Mr. Justice Macpherson, Mr. Justice Markby, and Mr. Justice Glover.

1875
Nov. 30 &
Dec. 2.

MOTHOORMOHUN ROY (PLAINTIFF) v. SOORENDRO NARAIN
DEB (DEFENDANT).

Hindu Law—Age of Majority of Hindus—Act XL of 1858—Unconscionable Agreement—Usury.

A Hindu resident and domiciled in Calcutta, and possessed of lands in the mofussil, borrowed in Calcutta a sum of money from the plaintiff, a professional money-lender, and agreed by his bond to repay the principal with interest at 36 per cent. per annum in Calcutta. The defendant's age, at the time he executed the bond, was sixteen years and one or two months; but neither his person nor his property had been taken charge of by the Court of Wards, or by any Civil Court. The defendant having made default in payment, the plaintiff brought the present suit. The defendant pleaded his minority.

Held by the Full Bench that the law as to the age of minority governing the case was not Act XL of 1858, but the Hindu law, under which the defendant was not a minor at the time he executed the bond, and that therefore he was liable on it.

On the merits of the case, the lower Court (PHEAR, J.) found that the agreement was unconscionable, and one which a Court of Equity would not enforce. *Held* by the appeal Court (GARTH, C. J., and MACPHERSON, J.), in accordance with the decision of Phear, J., that the plaintiff was only entitled to a decree for the amount actually received by the defendant from him, with interest at 6 per cent.

APPEAL against the decision of PHEAR, J., dated the 26th April, 1875.

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Suit to recover money due upon a bond. The defendant, who was resident and domiciled in Calcutta, but who possessed lands in the mofussil paying revenue to Government, borrowed a sum of money from the plaintiff, a professional money-lender, on a bond bearing interest at 36 per cent. per annum. The defendant borrowed the money in Calcutta and agreed to repay it in Calcutta. He was at the time sixteen years and one or two months old. The defendant had not been taken charge of, either as regards his person or his property, by the Court of Wards or by any Civil Court. The defence was that the defendant was a minor at the time he entered into the contract, and that the transaction was an unreasonable and unconscionable one.

The case was heard by Phear, J., and the first issue raised was whether the defendant, at the time he entered into the contract, was or was not a minor, and on this issue the following judgment was delivered.

PHEAR, J.—According to the evidence of the plaintiff, the defendant was of the age of sixteen years and one or two months at the time the contract was entered into upon which this suit is brought; and the first question I have to decide, is whether the defendant was under the circumstances of the case, then a minor.

This depends upon the construction to be put upon Act XL of 1858. The general purpose of that Act is the care and protection of the property and persons of minors who have property. Its special purpose is to empower the Courts of the mofussil to exercise this care, to give this protection, and to direct them as to the means of doing so. S. 26 enacts that "for the purposes of this Act every person shall be held to be a minor, who has not attained the age of eighteen years," and by the Full Bench judgment in *Madhusudan Manji v. Debigobinda Nergji* (1), it was held that it was not the special purpose of the Act which limited the operation of the section, but

(1) 1 B. L. R., F. B., 49.

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that all persons whom it was the object of that Act to care for and protect came within it. As Sir Barnes Peacock, who delivered the judgment of the Court, put it,—the persons whose friends and relatives did not come forward to protect them by invoking the assistance of the Civil Court, certainly required such protection as the disqualification of minority would afford them, quite as much as, if not more than, those who were so cared for. And acting upon the authority of this decision, it seemed to me right in the case of *Jadunath Mitter v. Bolyechand Dutt* (1), for the reasons which I then gave, to hold that the Act operated within the Presidency town as well as in the mofussil, that is, as well, when the care of the disqualified person would properly devolve upon the High Court, as when that care would fall within the scope of the local mofussil Courts. A late Full Bench decision, however, *Cally Churn Mullick v. Bhuggobutty Churn Mullick* (2), ruled that this decision was wrong so far as the case of the person is concerned, who, together with his property, should be entirely within the limits of the High Court's local jurisdiction. I have not found it easy to gather from the reported words of the late Chief Justice who delivered the judgment of the Court in that case, the exact *ratio decidendi*. In the very last passage of the judgment, Sir Richard Couch says:—"We will not undertake now to define to what extent the Act may operate when a person, resident in the town of Calcutta, has property in the mofussil." This is just the case which is now before me, and I find, therefore, from this passage that the Full Bench expressly excluded it from the range of its decision. And, moreover, I also infer from this passage that it was possible consistently with the view, whatever it was, which was taken by the Full Bench of the scope and meaning of Act XL of 1858, that it should have some operation within the limits of the Presidency towns. For, had the Full Bench been of opinion that the Act had no such operation, and that it could not, in any case, affect the status in regard to minority of a person resident in the town of Calcutta, surely this passage would not have been added to the judgment.

(1) 7 B. L. R., 607.

(2) 10 B. L. R., 231.

And in meeting the grounds upon which the decision in *Jadunath Mitter v. Bolyechand Dutt* (1) was placed, the Chief Justice, if the report in the Bengal Law Reports is correct, does not seem to have been in all respects very successful.

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With regard to one of these grounds, he remarks, "As to Phear, J.'s reason that we ought not to attribute to the Legislature the intention to set up for the same persons two standards of majority, one to prevail in the mofussil, and the other in Calcutta, we think the answer is that two standards have been set up in the mofussil by Regulation XXVI of 1793, and it was the state of the law until Act XL of 1858 was passed." This, on reference to Regulation XXVI of 1793, it will be seen at once, must have been spoken under misapprehension; and I am certainly not aware that the state of the law, before Act XL of 1858, was, as the result of any legislation, comparable in kind with the supposed case which was the foundation of the remark in the judgment in *Jadunath Mitter v. Bolyechand Dutt* (1). And with regard to another ground of that judgment, namely, that the power of the Supreme Court over minors was not interfered with by the construction put upon the Act, the reporter of the Bengal Law Reports makes Sir Richard Couch say:—"If the Court could not order the property under its control of a person under eighteen to be made over to him, that would be affecting the powers of the Court." Now, the prohibitory words of the section (29), are—"Nothing contained in this Act shall be held to affect the powers of the Supreme Court over the person or property of any minor subject to its jurisdiction." Even the power to hand over the property of a person, who had been a minor, at the termination of his minority, cannot, I conceive, be said to be in any degree interfered with solely by prolonging the duration of the minority; still less, if possible are the powers of the Court over the person and property of the minor thereby affected, and I feel satisfied that the learned Chief Justice has been somewhat misreported in the version of his words which has been given in the Bengal Law Reports.

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desire to apply any principle which may be involved in the
decision of the Full Bench to the present case, I find myself
unable to discover what that principle is.

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As I have already remarked, the particular case now before me was expressly left untouched by the judgment of the Full Bench, and therefore the decision in *Jadunath Mitter v. Bolychand Dutt* (1), may be rightly applied to it, unless some overruling principle has been laid down in the later and superior decision. Under these circumstances, not, I am bound to say, without hesitation, I find myself obliged to hold that in this case where, although the defendant himself is resident in Calcutta, the bulk of his property is situated in the mofussil, Act XL of 1858 is operative to prescribe the limit of minority, and that up to the limit of age so prescribed, namely, eighteen years, the defendant has the status of a minor wherever he is. To hold otherwise would not only involve the various anomalies which have been spoken of in previous cases, but other practical inconveniences of more immediate consequence.

Suppose the family of the defendant had been resident in the mofussil instead of in Calcutta, and that, as is the case now, the defendant himself lived with the other members of the family, and suppose that under circumstances such as have in fact happened, and, as indeed would no doubt have happened on a supposition which I have now made, none of the members of the family thought it necessary or desirable that the defendant and his property should be placed under the immediate protection of the mofussil Courts, his uncle, the kurta of the family, and his mother, might well enough be satisfied that his interests would be well taken care of without the necessity of any such step as that. It is indisputable that, in this state of things where he requires the protection of minority as little as may be, he would, by the express intention of Act XL of 1858, remain a minor until the age of eighteen. And then suppose that, having, under these circumstances, reached the mature age of sixteen years, he some day eluded the watchfulness of his family

protectors, and managed to get in to Calcutta, there to join persons more practised in the ways of dissipation and wastefulness than he was ever likely to be in the way of meeting in the mofussil,—surely, under these changed conditions, he requires the protection of minority greatly more than he would have done had he remained at home. The words of Act XL of 1858 are wide enough to give it him, as I pointed out in the case of *Jadunath Mitter v. Bolgechand Dutt* (1), and the last Full Bench decision does not say the contrary. It seems to me therefore only reasonable to infer that the Act intended to give him this protection in Calcutta as well as elsewhere, and that the Legislature meant by the words of s. 26, when attaching the disqualification of minority, that it should be a personal disqualification, not slipping on and off accordingly as the person went to the one side or the other of the boundary line between Calcutta and the mofussil. The Full Bench decision in *Madhusudan Manji v. Debigobinda Newgi* (2), which is approved of in the decision in *Cally Churn Mullick v. Bhuggobutty Churn Mullick* (3), laid down that the disqualification intended by the Act was a general disqualification and not a special disqualification in regard to dealings with local property or any other limited object of that kind. In my opinion, then, the first issue must be decided against the plaintiff, and the suit dismissed without costs.

On the merits, PHEAR, J., was of opinion that the transaction was a wholly unconscionable agreement, and one which a Court of Equity would not enforce; and that even if the plaintiff's claim was not invalid by reason of the defendant's minority, it should be reduced to such a sum as was actually received by the defendant from the plaintiff, with interest at a reasonable rate. He accordingly expressed his opinion that if his decision on the question of minority had been otherwise, the plaintiff would only have been entitled to a decree for Rs. 4,390 with interest at 6 even per cent. from the date of the loan to the filing of the plaint.

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(1) 7 B. L. R., 607.

(2) 1 B. L. R., F. B., 49.

(3) 10 B. L. R., 231.

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From this decision there was an appeal which was heard before GARTH, C.J., and MACPHERSON, J., who, after hearing arguments both as to the age of majority, and on the merits, referred the question, as to what the age of majority, governing the case, to a Full Bench by the following order.

GARTH, C.J., (MACPHERSON, J., concurring).—In the case of *Madhusudan Manji v. Debigobinda Newgi* (1), it was ruled by a Full Bench, on a reference made in an appeal from a decision of the Judge of West Burdwan, that, under Act XL of 1858, every person in the mofussil not being a European British subject, is a minor until he attains the age of eighteen years. In the case of *Cally Churn Mullick v. Bhugobutty Churn Mullick* (2), the following question, which arose in a suit pending in the High Court, sitting in the exercise of its ordinary original civil jurisdiction, was referred for the decision of a Full Bench: "What is the age of majority of a Hindu, resident and domiciled in the town of Calcutta, and not possessed of any property in the mofussil?" The Full Bench held that the question was not affected by Act XL of 1858, and that in such a case the age of majority is the end of fifteen years.

In the present suit, a further question (not expressly covered by either of the decisions just mentioned) has arisen. A Hindu resident and domiciled in Calcutta, but possessing lands in the mofussil, paying revenue to Government, being more than sixteen and less than seventeen years of age, borrowed money in Calcutta, which he in Calcutta agreed to repay in Calcutta. Having failed to repay, and being in Calcutta, he is sued in this Court, on the Original Side, for the amount of money which he agreed to pay and interest. He has not been taken charge of (either as regards his person or his property) by the Court of Wards, or by any Civil Court.

The defendant having pleaded minority, the question is what is the law as to the age of minority which governs this case?

The question is very important, and as we have doubts as to

(1) 1 B. L. R., F. B., 49.

(2) 10 B. L. R., 231.

the answer to be given to it, we think it ought to be decided by a Full Bench, and we refer the question accordingly.

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The *Advocate-General*, offg. (Mr. Paul) for the appellant.—The question involved in this case was substantially decided in *Cally Churn Mullick v. Bhuggobutty Churn Mullick* (1). This case is hardly distinguishable from that. The defendant was a resident of Calcutta. His possessing property in the mofussil or elsewhere will not affect the question of majority. The law that determines his majority is one that affects his personal status without reference to the property. By the *lex loci contractus* he attained his majority at sixteen, which is the age fixed by the Hindu law, which this Court administers in cases of Hindus, and that law alone will govern this case. The law cannot be changed by the Court merely because there would be an anomaly in fixing sixteen to be the age of majority in Calcutta and eighteen out of Calcutta. There have been many anomalies between the mofussil law and the law administered in Calcutta in many respects. Even the procedure itself was wholly different until recently, and there are some anomalies to this day.

The Supreme Court alone exercised jurisdiction over minors residing in Calcutta. Minors resident in the mofussil were without sufficient protection, hence, Act XL of 1858 was passed for their benefit; see the preamble. [GARTH, C.J.—The Act was for the protection of property in the mofussil.] It was for the protection of the person and property; see s. 2 of the Act. The person in such a case could not be brought within the jurisdiction of the mofussil Court. The jurisdiction given by this Act is given to the mofussil Courts alone; s. 29 enacting that “the expression Civil Court as used in this Act shall not include the Supreme Court.” Property in the mofussil in such a case is not left without protection. When the Supreme Court took the person of the minor under its care, it appointed a guardian and also took charge of his property in the mofussil. It being one of the prerogatives of the Crown to superintend the affairs of minors, it may

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be doubted whether the Legislature could then interfere with minors residing in Calcutta who had property in the mofussil. The Act is not a general one to provide for all minors in and out of Calcutta. The Act nowhere provides for the management of the property separately from the care of the person, but it provides for both at the same time. Ss. 4 and 5 show that the Civil Court has the power to take charge of the property of a minor who is residing within its jurisdiction. By s. 5 application must be made to the Court within whose jurisdiction the minor is residing. In the case of *Madhusudan Manji v. Debigobinda Newgi* (1), the minor was not a resident of Calcutta, therefore he was considered to be subject to the provisions of Act XL of 1858, but if the decision proceeded on the ground that it would make an anomaly to hold otherwise, it is wrong, and this Court, as a Full Bench, can consider and question the decision of another Full Bench.

By the Succession Act (s. 3) and the Limitation Act (s. 3), the age of majority is fixed at eighteen years. There would have been no occasion for this if Act XL applied. The High Court administers the Hindu law as the Supreme Court did, and by that law a minor attains majority at the end of fifteen years. Therefore the contract made by the defendant in this case is good and valid according to law.

Mr. *Phillips* for the respondent.—No doubt anomalies in the law have existed: but the anomaly of a person having one status in one place, and another in another place, where the two places are in a country under the same rule, has never existed unless it exists under Act XL of 1858. It was never intended under that Act that the persons subject to it should have a shifting majority. If a person becomes subject to the Act, it governs him for all purposes and wherever he may be. The law upon this subject is laid down in Story on the Conflict of Laws, ss. 101 to 103. It seems that when a person is once a major by the law of his domicile, he is always so. [GARTH, C. J.—If the mofussil Court has the power to act, it might proceed to take charge of a minor, and come into

(1) 1 B. L. R., F. B., 49.

conflict with the High Court which might also think it proper to superintend his affairs.] If the minor were residing in the mofussil, the High Court would not act, and *vice versa*, but that is no reason why a boy of sixteen or seventeen should be left unprotected. Act XL of 1858 provides a machinery only for the mofussil Courts, and not for the Supreme Court, because the Supreme Court had its own machinery and its own procedure; but the provisions of the Act when it goes on to provide the age of majority are for all the Courts, both the Supreme Court and the Courts in the mofussil. The sections that follow s. 1 provide for a part of the purposes of the Act. All the detailed provisions are directed to persons and property in the mofussil. There is nothing to show that these persons must reside in the mofussil. "The purposes of this Act" must not be restricted to the machinery of the Act, but the wider purpose of protecting the property, for which purpose the extension of minority in Calcutta is as necessary as in the mofussil. The purposes of the Act are summed up in the general purpose, namely, the protection of property. If the property is in a district, the Court of the district may be put in motion, notwithstanding the minor may be residing elsewhere. If the minor should have property in more districts than one, and if he be residing in Calcutta, the Civil Court of any one of the districts may protect his property. Otherwise it would be impossible to protect the minor's property in the mofussil if the disability is not extended, and if the minor is, on coming into Calcutta, liable to be taken in execution. The Act, therefore, must have intended eighteen to be the age of majority applicable generally.

The *Advocate-General* in reply.

The following judgments were delivered by the Full Bench:—

GARTH, C. J. (JACKSON, MARKBY, and GLOVER, JJ., concurring).—We are of opinion that the question which has been submitted to us in this reference, is not distinguishable in principle from that which was decided by the Full Bench in the case of *Cally Churn Mullick v. Bhuggobutty Churn Mullick* (1), and must be governed by that decision.

(1) 10 B. L. R., 231.

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It was there held that the provisions of s. 26, Act XL of 1858, extended only to those minors whose persons and property were placed by that Act under the protection of the Civil Courts of this country, other than the Supreme Court, and consequently that a person resident in Calcutta, and subject to the jurisdiction of the Supreme Court, did not come within the provisions of that section.

In this case the defendant is proved to be resident and domiciled within the town of Calcutta. The contract upon which he is sued was made in Calcutta, and was to be performed in Calcutta. His person and his property, although some of that property may be situate in the mofussil, was, so long as he was a minor, subject to the jurisdiction of the High Court, which has been substituted for the Supreme Court, and we therefore consider that the principle upon which the decision in *Cally Churn Mullick v. Bhuggobutty Churn Mullick* (1) was based, applies with equal force to the present case.

MACPHERSON, J.—In *Madhusudan Manji's case* (2), the parties and their property, and the litigation connected with them, were all in the mofussil. The question of the operation of Act XL of 1858 within the local limits of Calcutta or on persons residing there was not before the High Court, either directly or indirectly, and was never referred to in any way. In truth, the decision in that case scarcely touches the present issue at all.

A good deal has been said about anomaly and inconvenience. In *Madhusudan Manji's case* (2), the Full Bench dealing with persons living in the mofussil, and Courts in the mofussil, deemed it anomalous and inconvenient that there should be more than one age of majority in the mofussil. And the Full Bench may have been justified in drawing inferences based on its sense of that inconvenience and anomaly. But these inferences could not properly have been drawn had the question been as to the age of majority of Hindus residing in Calcutta. It might be improbable that the Legislature would sanction anything so inconvenient as two possible ages of attaining majority in the mofussil,

(1) 10 B. L. R., 231.

(2) 1 B. L. R., F. B., 49.

where one general law was supposed to prevail. But no such improbability could exist as regards Calcutta and the mofussil taken together, inasmuch as the whole substantive law prevailing in Calcutta (and, indeed, the law of procedure also), was in 1858 avowedly different from that of the mofussil. The position of the parties as to both their persons and their property differed in innumerable respects according as they happened to reside in Calcutta or in the mofussil; and many such differences exist up to the present day. Therefore the argument based on anomaly and inconvenience which was referred to by the Full Bench in *Madhusudan Manji's case* (1) has no applicability to the question now before us.

In the later case of *Cally Churn Mullick* (2), the Full Bench has held that none of the powers conferred by Act XL of 1858 could be exercised within the jurisdiction of the Supreme Court; that the construction which was first put upon that Act (by the Supreme Court and by the High Court on the Original Side), that it did not alter the Hindu law in Calcutta as to the age of majority, was the right construction; that the Legislature in passing Act XL of 1858 never intended to alter the laws in Calcutta; and that the end of fifteen years is the age of majority of a Hindu resident and domiciled in the town of Calcutta, and not possessed of any property in the mofussil.

The present question was, in my opinion, practically determined by the Full Bench in *Cally Churn Mullick's case* (2), though the Court did then decline to express any opinion on it. If it be good law, as the Court then decided, that Act XL of 1858 did not alter the Hindu law in Calcutta as to the age of majority, it seems to me that there is no need to discuss the matter further, for it is clear that unless the Hindu law in Calcutta as to the age of majority was altered by Act XL of 1858, the defendant now before us was of full age at the time he entered into the contract on which he is sued.

As regards this particular case, out of which this reference to a Full Bench has arisen, the facts being such as are stated in

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the order referring the matter for our decision. I have myself no doubt that the plea of minority is bad.

After this decision of the Full Bench the appeal Court, on 2nd December, delivered their judgment on the merits. The cases which had been referred to on the question of the unconscionable character of the transaction, and as to whether a Court of Equity would enforce it, and as to the rate of interest, were *Greenough v. McClelland* (1), *Inman v. Inman* (2), and *Earl of Aylesford v. Morris* (3), and the other cases there cited.

The judgment of the Court was delivered by

MACPHERSON, J.—The plea of minority having been disposed of by the decision of the Full Bench, it remains for us to consider what amount the plaintiff is entitled to recover. Phear, J., being of opinion that, even supposing the defendant to have attained the age of majority at sixteen, the bargain was most unconscionable and unfair, and one which no Court of Equity ought to enforce, declared that the plaintiff could in no event get a decree for more than the sum actually paid by him to the defendant with interest at the rate of 6 per cent. per annum up to the date of filing the plaint. Disallowing the three sums of Rs. 450 retained for interest, Rs. 100 paid to Baboo Romanath Law the Attorney, for having, in his character of solicitor for the plaintiff, advised the plaintiff that the defendant was legally of age, and Rs. 60 for office or amlah expenses, Phear, J., declared that the balance (which would be Rs. 4,390) was the amount paid by the plaintiff to the defendant.

For the appellant it is contended, that if the defendant was legally of age when he signed the promissory note, he is bound by the terms of the note, and the plaintiff is entitled to a decree for the full amount claimed.

We agree with Phear, J., in the view which he has taken of the facts of this case: and we are of opinion that the plaintiff is entitled to a decree for what he actually advanced, with interest at the rate of six per cent. per annum, and to nothing

(1) E. & E., 424; S. C. on appeal,
Id., 429.

(2) L. R., 15 Eq., 260.

(3) L. R., 8 Ch. App., 484.

more. It is an entire mistake to suppose, that because the law against usury has been repealed, a money-lender can, as a matter of course, enforce a contract such as this, made with a young man who has only just attained the legal age of majority. *Miller v. Cook* (1) and *Earl of Aylesford v. Morris* (2) are clear authorities that the jurisdiction of the Court over unconscionable bargains of this nature is not affected by the repeal of the usury laws. The remarks of the Lord Chancellor in the latter of these cases are very pertinent to the state of facts now before us. After referring to the old usury laws and arbitrary rule of equity as to sales of reversions, Lord Selborne says:—"Both have been abolished by the legislature; but the abolition of the usury laws still leaves the nature of the bargain, capable of being a note of fraud in the estimation of this Court; and the Act as to 'sales of reversions' (31 Vict., c. 4) is carefully limited to 'purchases made *bonâ fide* and without fraud or unfair dealing,' and leaves under-value still a material element in cases in which it is not the sole equitable ground for relief. These changes of the law have in no degree whatever altered the *onus probandi* in those cases, which, according to the language of Lord Hardwicke, 'raise from the circumstances or conditions of the parties contracting weakness on one side, usury on the other, or extortion, or advantage taken of that weakness,' a presumption of fraud. Fraud does not here mean deceit or circumvention; it means an unconscientious use of the power arising out of these circumstances and conditions; and when the relative position of the parties is such as *primâ facie* to raise this presumption, the transaction cannot stand unless the person claiming the benefit of it is able to repel the presumption by contrary evidence, proving it to have been in point of fact fair, just, and reasonable. This is the rule applied to the analogous cases of voluntary donations obtained for themselves by the donees, and to all other cases where influence, however acquired, has resulted in gain to the person possessing at the expense of the person subject to it."

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(1) L. R., 10 Eq., 611.

(2) L. R., 8 Ch. App., 484;

also *Barrett v. Hartley*, L. R., 2 Eq.,
789, see at p. 795, per V. C. Stuart.

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Again he says:—"It is sufficient for the application of the principle, if the parties meet under such circumstances, as, in the particular transaction, to give the stronger party dominion over the weaker; and such power and influence are generally possessed, in every transaction of this kind, by those who trade upon the follies and vices of unprotected youth, inexperience, and moral imbecility. In the cases of catching bargains with expectant heirs, one peculiar feature has been almost universally present; indeed its presence was considered by Lord Brougham to be an indispensable condition of equitable relief, though Lord St. Leonards, with good reason, dissents from that opinion. The victim comes to the snare (for this system of dealing does set snares, not, perhaps, for one prodigal more than another, but for prodigals generally as a class) excluded, and known to be excluded, by the very motives and circumstances which attract him, from the help and advice of his natural guardians and protectors, and from that professional aid which would be accessible to him, if he did not feel compelled to secrecy. He comes in the dark, and in fetters, without either the will or the power to take care of himself and with nobody else to take care of him. Great Judges have said that there is a principle of public policy in restraining this."

Such being the law on the subject, and as we concur with Phear, J., in his finding of the facts, and in his opinion as to the unconscionable nature of the transaction, we declare the plaintiff entitled to a decree for Rs. 5,000 less the two sums of Rs. 450 and Rs. 100, that is, for Rs. 4,450 with interest at six per cent. per annum from the date of the promissory note to the date of filing the plaint and no more.

As the defendant, at the time he borrowed the money, asserted that he was of full age, and as he was in law then of full age, and as the plea of minority has caused the chief contest in the suit, we think that the defendant ought to pay the costs of this appeal (including those of the reference to the Full Bench).

Attorneys for the appellant: Messrs. *Trotman & Co.*

Attorneys for the respondent: Messrs. *Ghose & Bose.*

APPELLATE CIVIL.

Before Mr. Justice Macpherson and Mr. Justice Morris.

DYEBUKEE NUNDUN SEN AND ANOTHER (DEFENDANTS) v MUDHOO
MUTTY GOOPTA AND ANOTHER (PLAINTIFFS).*

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Dec. 2.

*Act XI of 1865, ss. 6 and 12—Civil Court, Jurisdiction of—Mofussil Small
Cause Court—Act XXIII of 1861, s. 27—Special Appeal.*

A suit for a balance due on account of rents collected from the plaintiffs' zemindaris by the defendants' father acting as agent of the plaintiffs, is a suit in which money is claimed as due on a contract within the meaning of s. 6, Act XI of 1865. Where the amount claimed in such a suit does not exceed Rs. 500, it is cognizable by a Small Cause Court; notwithstanding it may be necessary to go into the accounts of both parties to determine what is due. Where such a suit for an amount under Rs. 500 is entertained by the Civil Court within the local jurisdiction of a Small Cause Court, a special appeal lies to the High Court,—s. 27 of Act XXIII of 1861 only applying to a suit which is properly brought in a Civil Court, because there is no Small Cause Court having jurisdiction to try it.

THE suit for the recovery of Rs. 498 odd for balance due on account of rents collected by the father of the defendants from the plaintiffs' zemindaris.

The suit was instituted in the Munsif's Court at Rampore Beaulah, in the district of Rajshahye, where a Small Cause Court also existed, upon the allegations that the defendants' father had, during his lifetime, acted as the general agent of the plaintiffs, in which capacity he had collected various sums of money from their zemindaris, and that, in rendering an account thereof, he had fraudulently overcharged the sum which the plaintiffs now sued to recover. The defendants, among other pleas, objected to the cognizance of the suit by the Civil Court, the claim being for a sum less than Rs. 500.

The Munsif dismissed the suit on the ground that it was not maintainable in the Civil Court, s. 6 of Act XI of 1865 providing expressly that, in cases where the demand, whether

* Special Appeal, No. 3061 of 1874, against the decree of the Subordinate Judge of Zilla Rajshahye, dated the 1st August, 1874, reversing the decree of the Munsif of Beaulah, dated the 9th February, 1874.

1875 on balance of account or otherwise, did not exceed Rs. 500, the Small Cause Court alone should have jurisdiction.

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On appeal, the Subordinate Judge reversed the Munsif's order and decreed the plaintiffs' claim, holding that, as the present case involved adjustment of account of a complicated character which was incompatible with the simple procedure of the Small Cause Court, the Civil Court had jurisdiction to entertain the suit.

From that decision the defendants preferred a special appeal to the High Court.

Baboo *Bhyrub Chunder Banerjee*, on behalf of the respondents, took a preliminary objection, that, under s. 27 of Act XXIII of 1861, no special appeal would lie, as the demand did not exceed Rs. 500.

Baboo *Mohini Mohun Roy* (Baboo *Kishori Mohun Roy* with him) for the appellants contended that s. 27 of Act XXIII of 1861 debarred a special appeal only where the Civil Court had properly exercised jurisdiction. Had there existed no Court of Small Causes at the place where the suit was brought, the Civil Court would have properly exercised jurisdiction in entertaining it, and the special appeal would have been barred under s. 27 of Act XXIII of 1861. But there being a Small Cause Court at Beaulah, the Subordinate Judge acted *ultra vires* in not dismissing the plaintiffs' claim under ss. 6 and 12 of Act XI of 1865.

Baboo *Bhyrub Chunder Banerjee* in reply.

The judgment of the Court was delivered by

MACPHERSON, J.—We think that in this case the Munsif was right in holding that the proceedings throughout have been without jurisdiction, because the suit is of a class cognizable by the Small Cause Court of Rampore Beaulah, and is therefore one which, under s. 12, Act XI of 1865, could not be heard or “determined in any other Court having jurisdiction within the local limits of the jurisdiction” of that Small Cause Court.

The suit is for a balance claimed to be due on account of rents of the plaintiffs' zemindaris collected by the father of the defendants. It is a suit in which money is claimed as due on a contract within the meaning of s. 6 of Act XI of 1865; and therefore is a suit cognizable by the Small Cause Court, as the amount claimed did not exceed Rs. 500; and it is none the less cognizable by the Small Cause Court, because it may have been necessary to go into the accounts of both parties to see whether the amount claimed is really due or not. S. 6 contemplates the possibility of having to examine accounts between parties, for it says:—"The following are the suits which shall be cognizable by Courts of Small Causes, namely, claims for money due on bond or other contract . . . or for damages, when the debt, damage, or demand does not exceed in amount or value the sum of Rs. 500, whether on balance of account or otherwise." The only balance of account excepted being "a balance of partnership account, unless the balance shall have been struck by the parties or their agents."

In thus deciding, we are in accord with the decision of a Division Court in the case of *Joogul Kishore Roy v. Rughoonauth Seal* (1). An order made by another Division Court, in the case of *Krishna Kinkur Roy v. Madhub Chunder Chucker-bully*, may perhaps appear to decide the same question differently. But the Judges in the latter case merely concurred in the opinion of the Judge of the Small Cause Court, who made the reference to this Court. The opinion was that the suit (which involved intricate accounts) should be tried by the ordinary Civil Court, and not by the Court of Small Causes. The technical question of jurisdiction was not raised either by the Judge of the Small Cause Court or by this Court; and the whole matter seems to have been treated more as one of

(1) *Special Appeal No. 757 of 1872, heard before Jackson and Mit-ter J.J., on the 24th April, 1873.*—This was a suit to recover Rs. 428, balance of account due from the defendant, who had been employed by the plaintiff as an agent to look after his law suits, and receive and disburse money

connected with such suits, the defendant receiving a monthly salary. It was held that it was a suit within the meaning of s. 6, Act XI of 1865, and therefore no special appeal would lie. See also *Prosunno Chunder Roy v. Sreenath Sreenanee*, 7 W. R., 422 (Jackson and Markby, J.J.)

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convenience than of strict law (1). Moreover, no one appeared to argue the case in the High Court.

It is said that, as the present case has been tried by the Civil Court, we have no right to meddle with its decision, because s. 27, Act XXIII of 1861, says:—"No special appeal which shall lie from any decision or order shall be passed on regular appeal by any Court subordinate to the High Court, in any suit of the nature cognizable in Courts of Small Causes, when the debt, damage, or demand for which the original suit shall be instituted shall not exceed Rs. 500, but every such order or decision shall be final." But s. 27 of Act XXIII of 1861 applies only to a suit which is properly brought in a Civil Court, because there is no Small Cause Court having jurisdiction to entertain it. Where a Small Cause Court has been constituted, that Court alone has jurisdiction in a certain class of cases. But where no Small Cause Court has been constituted, that same class of cases must be brought in the ordinary Courts. If they are properly brought in the ordinary Courts by reason of there being no Small Cause Court having jurisdiction, then (and then only) s. 27 of Act XXIII of 1861 is applicable. That section is not to be construed as meaning that, if a suit is improperly brought in a Civil Court which has no jurisdiction to entertain it, instead of in a Small Cause Court which has jurisdiction, the parties cannot come up in special appeal to have the matter set right (2). We have no doubt that a special appeal does lie in such cases.

We set aside the decree of the Subordinate Judge. The appeal is allowed, and the plaintiffs' suit dismissed, on the ground that it ought to have been brought in the Small Cause Court of Rampore Beaulah, and that the Munsif had no jurisdiction. The plaintiffs must pay the costs of this appeal and of the proceedings out of which this appeal arises, that is to say, of the last hearing before the Subordinate Judge.

Appeal allowed.

(1) The case was accordingly not B. L. R., 717, where, however, the reported in the Bengal Law Reports. order setting aside the decree was

(2) See *Tarini Churn Mookerjee v. Raja Purna Chandra Roy*, 6 High Courts' Act. made under the 15th section of the

Before Mr. Justice Glover and Justice Mitter.

MONMOHINEE DASSEE (PLAINTIFF) v. KHETTER GOPAUL DEY
(DEFENDANT). *

1875
August 20.

Appeal—Act XXVII of 1860—Deposit of Security by Person entitled to a Certificate.

No appeal lies under Act XXVII of 1860 on a question of the deposit of security by a person who has been declared entitled to a certificate under the Act (1).

A CERTIFICATE of administration of the estate of Boikunto-nath Dey, under Act XXVII of 1860, was, on 22nd January, 1875, granted to his widow Mussamut Monmohinee Dassee, in an application made by her for the purpose, which was opposed by one Khetter Gopaul Dey, on the deposit by her as security of a duly registered bond executed by her, pledging a house worth Rs. 800 and a Government promissory note for Rs. 1,000. Subsequently it was brought to the notice of the Court that the Government note deposited as security belonged to the estate of the deceased; and the Court thereupon made an order, setting aside the order of 22nd January, 1875, and directing that Monmohinee Dassee should deposit security to the amount of Rs. 1,500 in the shape of property to which she had a legal title as owner.

From this order, Monmohinee Dassee appealed to the High Court.

Baboos *Mohesh Chunder Chowdhry, Abinash Chunder Banerjee* and *Biprodass Mookerjee* for the appellant.

* Miscellaneous Regular Appeal, No. 169 of 1875, against an order of the Judge of Zilla Patna, dated the 4th of June, 1875.

(1) See *Mussamut Soonea v. Ram* amount of security ordered to be *Saha*, 2 All. H. C. Rep., 146, where it deposited; but that when an appeal was held that an appeal would not lie had been properly instituted under s. 6, Act XXVII of 1860, merely s. 6, the Court might vary the order for the purpose of reducing the as to the security.

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Baboo Bhowany Churn Dutt for the respondent.

For the respondent a preliminary objection was taken that no appeal would lie under Act XXVII of 1860, on a question of taking security from a certificate-holder, and in support of the objection the cases of *Rajmohini Chowdhraïn v. Denobundhoo Chowdree* (1) and *Banee Madhub Mookerjee v. Nilumbur Banerjee* (2) were referred to.

For the appellant, the case of *Tarini Churn Brohmo v. Bama-soonduree Dossee* (3) was cited.

(1) *Miscellaneous Regular Appeal*, No. 68 of 1872, from an order of the Judge of Dacca, heard before Kemp and Glover, J.J., on 24th April, 1872.—An order had been made by the Judge of Dacca, calling on Rajmohini Chowdhraïn to deposit Rs. 10,000 as security before granting her a certificate under Act XXVII of 1860, for the collection of debts due to the estate of her deceased husband. The High Court, on the grounds stated in the portion of their judgment cited (*post*, p. 129), held that there was no appeal from the Judge's order.

(2) 8 W. R., 376.

(3) *Miscellaneous Regular Appeal*, No. 82 of 1873, from an order of the Judge of the 24-Pergunnahs, heard before Jackson and D. Mitter, J.J., on 29th July, 1873.—An application was made by Tarini Churn Brohmo for the grant to him of a certificate under Act XXVII of 1860. The application was opposed by Bama-soonduree Dossee, who had also made an application for a certificate; but a question arose as to her identity, and an enquiry was commenced by the Judge, and the matter postponed for the examination of certain witnesses on commission. Before their evidence had been taken, the Judge, on reconsideration, being of opinion that he had sufficient evidence before him to

enable him to decide the case, gave his decision, refusing the certificate. From this decision Tarini Churn appealed to the High Court. Jackson, J., in delivering judgment, said:—"I have no doubt whatever that an appeal lies from the result of an enquiry or omission to make an enquiry under this Act. Section 6 declares that the granting of a certificate may be suspended by an appeal to the Sudder Court. I understand that to mean that there may be an appeal, and that on such appeal the Court may suspend the granting of the certificate, or may declare the party to whom the certificate should be granted, or may direct such further proceedings for the investigation of the title as it thinks fit. That it seems to me merely recognizes and declares the power of the Court to superintend the proceedings of the District Court, and enables parties to have the benefit of that superintendence by way of appeal. That being the case, I think it is impossible to doubt that we ought in this case to direct the completion of the enquiry. I think the proceedings must go back to the District Court, in order that the enquiry may be completed, and the Judge determine, after hearing evidence and the arguments of counsel, which party is entitled to the certificate."

The judgment of the Court was delivered by

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GLOVER, J.—In *Rajmohini Chowdrain v. Denobundhoo Chowdree* it is decided that “s. 6, which is the only section which refers to the right of appeal, limits it to the question of the grant of the certificate. This Court would be able to decide on appeal whether the Judge had selected the proper person to give the certificate to, but there is no section which gives any appeal with reference to the amount of security which the Judge may think it right to demand from the applicant for a certificate, and there is no general section as there is in the cognate Act XL of 1858 with regard to appeals.” And in *Banee Madhub Mookerjee v. Nilambur Banerjee* (1) it is said with reference to s. 6,—“the intention of the section was to enable a person aggrieved by the granting of a certificate to some other person to come before the Sudder Court and appeal against such grant.” And the gist of the decision is that, except with reference to the grant of a certificate, there is no appeal allowed by the Act.

Reference however was made to a case which is said to maintain a contrary view—*Tarini Churn Brokmo v. Bama-soonduree Dossee*. In this case it is laid down that, under Act XXVII of 1860, an appeal lies from the result of an enquiry or omission to make such enquiry. But this enquiry or omission to make enquiry seems to me to refer exclusively to the grant of certificates.

The learned Judges say, speaking of s. 6, “it recognizes and declares the power of this Court to superintend the proceedings of the District Court, and enable parties to have the benefits of that superintendence by way of appeal.”

This was with reference to an enquiry into the title to a certificate which the District Judge had not completed, having delivered his judgment without taking all the evidence adduced by the parties; and this, I have no doubt, would be a matter binding the proper person to whom a certificate should be granted, which would allow of an appeal under s. 6.

(1) 8 W. R., 376.

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But I find nothing in the judgment which affirms this Court's power to hear an appeal as to any other matter than those which are connected with the propriety or otherwise of an order made granting a certificate, and there is nothing as it seems to me in the decision that in any way conflicts with the two previously quoted.

I think therefore that we must dismiss this appeal. I should have been willing to interfere if we could have done so, for the Judge's order seems to make it impossible for the widow ever to be able to take out the certificate, and without it she cannot draw the interest on the Government promissory note, which is said to be and probably is her sole means of living.

Appeal dismissed.

ORIGINAL CIVIL.

Before Mr. Justice Phear.

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 Jany. 12.

REMFRY AND ANOTHER v. SHILLINGFORD AND ANOTHER.

Bills of Exchange Act (V of 1866)—Suit on Promissory Note payable by Instalments.

Where a promissory note is payable by instalments, and contains a stipulation that, on default in payment of the first instalment, the whole amount is to become due, a suit to recover the whole amount on default made in payment of the first instalment cannot be brought under Act V of 1866 (1).

SUIT to recover the principal amount with interest on a promissory note made by the defendants in favor of the plaintiffs in the following form :

"We jointly and severally promise to pay Messrs. Hamilton and Co. at their office in Calcutta, the sum of Rs. 1,778-6-9, with interest thereon at the rate of 12 per cent. per annum, by two equal instalments, on 1st July, 1875, and 1st September, 1875,

(1) See on the similar point arising 2 B. L. R., O. C., 151; *In the matter of Ganpat Manikji*, 6 Bom. H. C. R., registered agreement, under s. 53 of O. C., 64; and *Venithithan Chetty v. the Indian Registration Act, 1866. Moothiroolandi Chetty*, 6 Mad. H. *In the matter of Lachmipat Singh*, C. R., 4.

for value received, and we agree that in case of our failing to pay the first instalment, the whole amount of this note shall become immediately payable.

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M. H. SHILLINGFORD."

The plaintiffs were the members of the firm of Hamilton & Co.

The defendants made default in payment of the first instalment, and on 13th July, 1875, the plaintiffs instituted this suit under Act V of 1866 for the whole amount of the note with interest, stating in their plaint the making of the note and the fact of default in payment of the first instalment. A decree was now asked for on proof of the service of summons and on the usual certificate of the Registrar that no leave to defend the suit had been obtained.

Mr. *Macrae* for the plaintiffs.

The Court remarked that there was no evidence of the non-payment of the first instalment, and, as no evidence could be given under Act V of 1866, it did not appear that the whole amount was due, and therefore the decree asked for could not be given.

Mr. *Macrae* contended, first, that there was nothing in Act V of 1866 to prevent such a suit from being brought under the Act on a note in the present form; second, that no further evidence was necessary here than was required in a suit on a note in the ordinary form, not payable by instalments. In such a case there is nothing on the face of the note to show that anything is due on it: and the Court accepts the fact that the amount claimed is due from the statement in the plaint that it is so, and the non-appearance of the defendant, after summons had been duly served on him, to deny the statement. So here the defendants undertaking by their note that if the first instalment is not paid on due date the whole amount is to become payable, the plaint states that the first instalment was not paid on due date, and the defendants do not deny that statement.

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It is submitted that a decree can therefore be given for the whole amount without further evidence.

Cur. adv. vult.

PHEAR, J.—I think the Act was only intended to apply to those cases in which the bill itself together with mere lapse of time is sufficient to establish for the plaintiff a *prima facie* right to recover.

In this case the plaintiff is obliged to allege the occurrence of another fact besides the lapse of time since the making of the bill, namely, that the first instalment has not been paid, which fact is necessary according to the terms of the bill in order to complete the plaintiffs' right to sue. There is no evidence before the Court of this fact, and I do not think the Legislature intended that the summons served in the forms prescribed by Act V of 1866 should have the effect of enabling the plaintiffs' statement of the fact in his petition to prevail without evidence.

It is argued that the day for the payment of the first instalment being past, it would be incumbent on the defendant to prove payment in answer to any claim for that alone; and that therefore this instalment must be taken to be unpaid until the defendant proves the contrary, which he is not allowed to do in these proceedings. But this argument I think involves a slight error. The lapse of time alone suffices to establish that the first instalment is due to the plaintiff: but it does not give rise to any presumption either way as to payment: only in a suit for that instalment, the money being shown due, the burden of proof on the contest is shifted. There being then no presumption that the instalment is not paid, *à fortiori* there is no presumption that the second instalment is due. In short, there is no ground of presumption or evidence on which the contingency required to complete the plaintiffs' right of action has happened, and I don't think, as I have already said, that the procedure of Act V of 1866 was intended to enable the plaintiff to succeed on his own allegation merely.

I cannot give the plaintiff a decree as the case now stands, but a fresh summons as under Act VIII of 1859 may issue.

Attorneys for the plaintiff: Messrs. Orr and Harris.

PRIVY COUNCIL.

BAIJUN DOOBEY AND OTHERS (DEFENDANTS) v. BRIJ BHOOKUN
LALL AWUSTI (PLAINTIFF.)

P. C.*
1875
July 2 & 3.

[On appeal from the High Court of Judicature at Fort William in Bengal.]

Hindu Widow—Sale of Right, Title, and Interest of Widow—Execution of Decree—Arrears of Maintenance—Rights acquired by Auction-Purchaser.

C, a Hindu, inherited from his father property charged, under the Mitakshara law, with the maintenance of *N*, his mother. *C* dying without issue, his property passed to *D*, his widow, who allowed the maintenance of *N* to fall into arrears. *N* brought a suit against *D* personally for the amount of the arrears, and obtained a money decree, in execution of which *D*'s right, title, and interest in the property left by her husband were sold. Neither the decree nor the sale proceedings declared the property itself to be liable for the debt. In a suit by the reversionary heir of *C*, after the death of *D*, to establish his right of inheritance to, and to recover possession of, *C*'s estate, *Held*, that the purchaser at the execution-sale took only the widow's interest, and not the absolute estate, and therefore the plaintiff was entitled to recover.

APPEAL from a decree of a Division Bench (Loch and Ainslie, JJ.) of the Calcutta High Court, dated the 22nd March, 1872, reversing a decree of the Subordinate Judge of Gya, dated the 13th June, 1871, which dismissed a suit brought by the respondent to establish his right of inheritance to, and recover possession of, certain immoveable property as heir of his cousin Chintamun Awusti.

The facts are sufficiently stated in the report of the case before the High Court (1).

From that decision the defendants brought the present appeal. Baijun Doobey, the principal appellant, having died while the appeal was pending, the name of his brother and representative, Hazari Doobey, was substituted on the record.

Mr. Leith, Q. C. (Mr. C. Arathoon with him) for the appellants:—Net Konwar's claim for maintenance was a general charge on her husband Muddun Mohun's estate and on every

* Present:—SIR J. W. COLVILE, SIR B. PEACOCK, SIR M. E. SMITH, AND
SIR R. P. COLLIER.

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part of it. The non-payment to her of maintenance by Doorga Konwar, who was in possession of the estate as Chintamun's widow, rendered the estate itself, and not merely the interest of Doorga, liable for sale. The suit and decree were against Doorga, not in her personal, but in her representative capacity, and the sale in execution of the decree was consequently not merely of her personal interest but of the absolute estate. It is true that the proclamation of sale only sets forth that the right, title, and interest of the judgment-debtor would be sold, but the proclamation refers to the decree, and intending purchasers were entitled to look at the decree to see what in reality was the subject of the sale. On looking at the decree, it would be seen that the judgment-debtor had been sued, not on a personal debt, but as being in possession of an estate which was chargeable, into the hands of whomsoever it might pass, with the maintenance decreed. The case falls within the provisions of s. 203, Act VIII of 1859. Doorga was the representative of the deceased Chintamun, and the decree against her might properly be executed by the sale of the property derived from him. She was liable so far as there were assets. In support of the contention that the auction-purchaser should, under the circumstances, be held to have taken an absolute estate, the cases of *Ishan Chunder Mitter v. Buksh Ali Sowdagur* (1), *Tarakant Bhattacharjee v. Luckhee Dabea* (2), *Tiluck Chunder Chuckerbutty v. Muddun Mohun Joogee* (3), *Anund Moyee Dossee v. Mohendro Narain Doss* (4), and *The Manager of the Durbhunga Raj v. Maharajah Coomar Ramaput Singh* (5) were cited.

Mr. T. H. Cowie, Q. C. and Mr. B. Wood for the respondent.—We admit that the maintenance of Net Konwar was a general charge on the whole estate of Muddun Mohun. The general right to such maintenance under the Mitakshara law is unquestionable. The case does not fall within the provisions of s. 203, Act VIII of 1859. The argument for the appellants rests on a fallacy in the equivocal use of the terms 'representa-

(1) Mars., 614.

(2) 2 Hay, 8.

(3) 15 B. L. R., 143 note.

(4) 15 W. R., 264.

(5) 10 B. L. R., 294; S. C., 14
Moore's I. A., 605.

tive, and 'assets.' A widow may be sued as representative of her deceased husband on a debt contracted by him. It was not, however, as the representative of Chintamun that Doorga was liable for the maintenance of Net Konwar but as being in possession of the estate charged with that maintenance. It was in respect of her own enjoyment of the estate that her liability arose, and not as representing some one else who was bound and had failed to pay. The maintenance was payable out of the revenue which Doorga drew from the estate, and which was amply sufficient to meet the charge. The cases of *Ishan Chunder Mitter v. Buksh Ali Sowdagar* (1) and *The Manager of the Durbhunga Raj v. Maharajah Coomar Ramaput Singh* (2) only establish that the Courts will not hold themselves fettered by the terms of a notification or certificate of sale, but will construe these in conformity with the real character of the decree. In the former of the cases cited, a widow was sued as guardian of her minor son on a debt contracted by her deceased husband, the father of the minor. The decree referred to the debt as on a bond of the deceased. The notification of sale erroneously described the property to be sold, as the property of the widow, although in another place it stated that what was to be sold was the right and interest of the debtor. The Court held that, as the widow had been sued as representing her son, the decree was really a decree against the son, and that it was the rights and interest of the son which had, in fact, been sold. In the other case, the claim was made against a widow as heiress and representative of her deceased husband in respect of a debt contracted by him in his life-time, and it was held that the estate of the deceased was liable in execution of the decree obtained against the widow. But, in the present case, the Court has to deal with a debt incurred by the widow herself. The maintenance was not in arrears at the time when Chintamun died. Doorga was sued on her own debt, not on her husband's. As to the interest which passes in execution of a merely personal decree against a widow, see *Greeschunder Lahooree v. Ramlal Sirkar* (3), *Kistomoyee Dossee v. Prosonno*

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(1) Mar., 614. (2) 10 B. L. R., 294; S. C., 14 Moore's I. A., 605.

(3) 1 W. R., 145; see at p. 151.

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Narain Chowdhry (1), and *Nugender Chunder Ghose v. Sreemuttu Kaminee Dossee* (2). The last of these cases was decided by the Privy Council, and is closely parallel to the present case. The cases of *Tiluck Chunder Chuckerbutty v. Muddun Mohun Joogee* (3) and *Anund Moyee Dossee v. Mohendro Narain Doss* (4) depend on the special law applicable to the sale of tenures for arrears of rent under the provisions of Act X of 1859 and Act VIII of 1835.

The suit for maintenance was not brought against Doorga in a representative capacity, nor was it brought as against assets. Except the mention of her being in possession of her husband's assets, there was nothing in the plaint to show that she was sued in any other capacity than as holding a widow's interest in the estate. The plaintiffs claim was not to be paid out of assets but to be paid by the holder of the estate. The High Court have observed in their judgment that "if Net Konwar desired to push her remedy beyond the life-interest of her debtor, she ought to have made the heir expectant a party." We do not rely on that remark, but we say that if the plaintiff sought to charge the estate itself, she should have done so in a suit properly framed for that purpose. But assuming that to be a suit in which there might have been a decree against the corpus of the estate, it was open to the plaintiff to waive her right to a decree against the estate, and to rest satisfied with personal relief against Doorga. [Sir B. PEACOCK.—If there were assets, the plaintiff might limit herself to assets.] We go further. The plaintiff might limit her decree or the execution of it to the mere personal remedy. The decree-holder might be content to sell only the widow's life-interest. When the position of the execution-creditor is considered, as being himself the reversionary heir, it is impossible to suppose that he intended to sell his own reversionary right. That it was the reversionary heir who was executing the decree was in itself an indication that the execution involved the widow's life-interest only. There was besides express notice in the proclamation and conditions of sale, that the rights and interests of the judgment-debtor only, and

(1) 6 W. R., 304.

(2) 11 Moore's 1. A., 241.

(3) 15 B. L. R., 143 note.

(4) 15 W. R., 264.

not those of any other person, were to be sold. The terms of the auction-purchaser's application for a certificate of sale show that he knew he had bought only a life-interest. He must have known from the price at which the property was sold that he was not buying the absolute estate. As to notice of equities, and the title taken by a purchaser at a Sheriff's sale, see *Gour-monee Dabee v. Reed* (1).

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Mr. *Leith* in reply referred to the case of *Tarakant Bhutta-charjee v. Luckhee Dabea* (2), and contended that the decision in the case of *Nugender Chunder Ghose v. Sreemutty Kaminee Dossee* (3) was distinguishable as resting on the construction to be given to the special provisions of s. 9, Act I of 1845.

The judgment of their LORDSHIPS was delivered by

Sir B. PEACOCK. — This is a suit brought by Brij Bhookun Lall against Baijun Doobey, to declare his right to the inheritance of Lot Moranwan and to obtain possession of that estate. The plaintiff claims the estate by right of inheritance from Chintamun as reversionary heir after the death of Doorga Konwar, the widow of Chintamun. The defendant claims by purchase under an execution of a decree against Doorga, the widow, and the question is, whether, under that decree, only the widow's interest, or the absolute estate, was sold. If only the widow's interest then upon the death of the widow the plaintiff succeeded to the estate as reversionary heir of Chintamun, and is entitled to recover; if, on the other hand, the whole interest passed under the sale, then the plaintiff as reversionary heir upon the death of the widow took no interest, but the estate passed to the defendant Baijun by reason of his purchase under the decree.

Now it appears that Sheo Churn and Muddun Mohun, two brothers, the sons of Deo Kishen, separated in estate. Muddun Mohun took one share of the estate and Sheo Churn the other. Muddun Mohun therefore obtained a separate estate. The

(1) 2 Tay. & Bell, 83; at p. 109.

(2) 2 Hay, 8.

(3) 11 Moore's I. A., 241.

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lands are situate in the District of Gya, and are subject to the rules of the Mitakshara law. Muddun Mohun having got this separate estate died leaving two sons, Balgobind and Chintamun; Balgobind died childless, and the whole estate came to Chintamun. Chintamun consequently acquired the estate by inheritance, and it was ancestral estate derived from the father, Muddun Mohun. Chintamun died childless, leaving two widows, Doorga Konwar and Radha Konwar. Muddun Mohun, the father, left a widow, who was the mother of Chintamun. The mother, Net Konwar, the widow of Muddun Mohun, was entitled to be maintained out of the estate held by Chintamun. The maintenance of Net Konwar, the widow of Muddun Mohun, was a charge upon the inheritance which came from Muddun Mohun. The liability to maintain the mother passed to Chintamun when he got the estate of his father, and when the estate passed from Chintamun to his widow, the liability to maintain Net Konwar still attached to the inheritance, and Doorga was bound to maintain her out of the inheritance. It appears that she allowed the maintenance of the mother, which had been fixed by the two brothers at Rs. 200 a year, to fall into arrear for about five years, making Rs. 1,000 for the five years. In consequence Net Konwar brought a suit against her personally for the amount due for maintenance with interest.

The plaintiff obtained a decree, whereby it was ordered that the plaintiff should recover from the defendant on account of her claim sicca Rs. 1,033-5-6, which is equivalent to Co.'s Rs. 1,102-3-6. The plaintiff prayed that the defendant be ordered to pay that amount, and by the decree it was ordered that the plaintiff do get from the defendant that amount.

Now the decree being a personal decree against the widow, according to the case of *Kistomoyee Dossee v. Prosonno Narain Chowdhry* (1), all that would be sold under it was the interest of the widow. It was there held that where only the rights and interests of a Hindu widow in the property left by her husband were sold in execution of a decree against her on account of a debt contracted by her, and neither the decree nor the sale proceedings declared

the property itself liable for the debt, the purchaser obtained an interest in the estate only during the widow's lifetime. This was a personal debt of the widow, and there is nothing to show that the estate of Muddun Mohun was charged by the decree. The sale against her in discharge of her personal liability was of the interest which belonged to her, and not of the estate which belonged to her husband. It was the widow's property only that was liable to be sold, or was sold, in discharge of her personal debt.

The notification of the sale under the decree was that a sale would be held of whatever right and interest the judgment-debtor had in the estates. It does not say that it is to be levied by sale of the husband's assets, but that it is to be realized by the sale "of whatever right and interest the judgment-debtor had in the estates." Then it is specifically pointed out: "Besides the right and interest of the judgment-debtor the right and interest of no other person will be sold at the said auction." The right and interest of the judgment-debtor which was to be sold, was that to which she was entitled, that which was liable to make good her default in non-payment of the maintenance. The sale took place under that notification, and it is clear, if that is important, that Brij Bhookun, the plaintiff, understood that what was to be sold was the widow's estate, not his own reversionary interest as the heir of his uncle. He wanted to sell the widow's estate, not his own interest. The real question is what was liable to be sold under the decree, and what in fact was sold. The purchaser may have made a mistake. He may have thought that the Court was selling something which they did not sell, but he was informed distinctly by the notification that the Court was selling the interest of the defendant in the estate, and that besides that interest no other interest was being sold. The appellant having purchased the interest of the judgment-debtor, obtained a certificate of the purchase, which stated that whatever right, title, and interest the judgment-debtor had in the said property had ceased from the date of the sale, and had become vested in the auction-purchaser.

It appears therefore to their Lordships that what was intended

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to be sold was the widow's interest only and not the absolute estate in the lot, and that, consequently, upon the death of the widow, the lot descended to the plaintiff as the reversionary heir of her husband, and that the purchaser did not obtain the absolute estate, but only the widow's interest in it, which continued only so long as the widow lived.

Several cases have been cited. The first case which was referred to was the case of *Ishan Chunder Mitter v. Buhsh Ali Sowdagur* (1). That case was fully gone into, and it was explained in the course of the argument that the suit was against the widow not in her own right as widow, but as representative of her son. In that case the widow had no estate at all to be sold, and when the decree and the order for sale are examined, it is clear that what was intended was the sale of the interest of the debtor: that was the interest of the son to whom the widow was the guardian; and when it was said that the interest of the defendant was sold, the widow's interest was not intended, but the interest of the person who was liable, and that was the son. That decision was referred to and approved by this Board in the case of *The Manager of the Durbhunga Raj v. Maharajah Coomar Ramaput Singh* (2). It appears to their Lordships that those cases are no authorities to show that, under the judgment and execution in this case, anything further passed to the purchaser than the widow's interest. Then two cases were cited, one *Tiluk Chunder Chuckerbutty v. Muddun Mohun Joogee* (3). That was a very different case from the present. It was there held, that "where a widow's estate is sold for arrears of rent, it is not merely the widow's life-interest that is transferred, and the reversionary heir cannot follow the estate after her death." There the widow was sued for rent under Act X of 1859. S. 105 of that Act enacts that, "if the decree be for an arrear of rent due in respect of an under-tenure which by the title-deeds or the custom of the country is transferable by sale, the judgment-creditor may make application for the sale of the tenure, and the tenure may there-

(1) Mar., 614.

(2) 14 Moore's I. A., 605; S. C., 10 B. L. R., 294.

(3) 15 B. L. R., 143 note.

upon be brought to sale in execution of the decree." The rent was due to the landlord. He recovered a decree, and under it the tenure, not the widow's interest, was sold.

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The other case which was cited was *Anund Moyee Dossee v. Mohendro Narain Doss* (1). That was the case of a suit brought for arrears of rent. It was there held, that "when neither the Hindu widow who has succeeded by inheritance, nor the reversioner, chooses to pay the arrears of rent which have fallen due upon a tenure, the tenure, if sold for such arrears, passes to the purchaser by the sale;" that is to say, if the rent is not paid, the tenure is answerable, and the landlord has a right to look to the tenure. Those cases therefore are not at all applicable to the present and are no authorities in favor of the defendants.

Then another case was cited which, in their Lordships' opinion, bears out the position already laid down. It is *Nogendro Chunder Ghose v. Sreemutty Kaminee Dossee* (2). It was there held that the decree in that case was not a decree against the land but a personal decree. It bears out the view which their Lordships have taken with regard to this decree, that it was a decree in a suit against the widow personally; that the decree was against her personally; that the attachment was to sell her property, that is, the interest which belonged to her in the estate, and which was liable to make good her default.

Looking, therefore, to the whole case, their Lordships are of opinion that the decision of the High Court was correct, and they will humbly recommend her Majesty that that decree be affirmed, with the costs of this appeal.

Appeal dismissed.

Agent for the appellants: Mr. T. L. Wilson.

Agent for the respondent: Messrs. Watkins and Lattey.

(1) 15 W. R., 264.

(2) 11 Moore's I. A., 241, see p. 257.

ORIGINAL CIVIL.

Before Mr. Justice Phear.

1876
Jan. 24.

THAKOOR KAPILNATH SAHAI (PLAINTIFF) v. THE GOVERNMENT (DEFENDANT).

Appeal to Privy Council—Dismissal of Appeal for Default in Deposit of Security, and in transcribing Record—Act VI of 1874, ss. 11, 14, § 15.

ON an application to stay proceedings in an appeal to the Privy Council, which had been presented on 2nd July, 1874, from a decision of the High Court on its Original Side, it appeared that no deposit had been made by the appellant to defray the costs of transcribing, &c., as provided by s. 11, Act VI of 1874; that no steps had been taken to prosecute the appeal; and that no security had been deposited for the costs of the respondent, since the petition of appeal was presented. The Court granted a rule calling on the appellant to show cause why the proceedings on appeal should not be stayed, and on his not appearing to show cause, ordered that the appeal should be struck off the file (1).

IN this case, which was decided by the High Court (Couch, C.J., and Birch, J.), in its original jurisdiction, on 5th May, 1874, an appeal to Her Majesty in Council was presented by the plaintiff on 2nd July, 1874, and a certificate was granted, that the appeal related to property of a value exceeding Rs. 10,000, and was a fit one for appeal.

ON 13th January, 1876, an application was made by the *Advocate-General*, offg. (Mr. Paul), for a rule calling on the appellant to show cause why the proceedings in the appeal should not be stayed, or such other order made as might seem proper. The application was supported by the affidavit of the Government Solicitor that the plaintiff had, as appeared from a certificate from the Registrar, made no deposit to defray the cost of translating, transcribing, and transmitting the record in the suit to the Privy Council as required by s. 11, cl. 6, of Act VI of 1874, relating to appeals to the Privy Council; that, as

(1) See *Gobardhan Barmano v. S. M. Manun Bibi*, 3 B. L. R., O. C., 126; S. C. on appeal, 5 B. L. R., 76.

appeared from the same certificate, he had not, since filing his petition of appeal, taken any steps to proceed therewith ; and that he had not deposited security for the costs of the respondent in the said appeal.

A rule was accordingly granted, and an affidavit of service of the rule on the appellant's attorney was filed.

The *Standing Counsel* (Mr. *Kennedy*) now applied that the rule might be made absolute.

The appellant did not appear.

The *Standing Counsel* submitted that, although there was no express provision either in Act VI of 1874 or in the rules of the Court for the stay of proceedings in such a case as the present, the Court had power to make an order staying the proceedings. S. 15 of Act VI of 1874, providing for stay of proceedings, apparently only applied to the failure to obey an order to deposit further security, but its provisions might well be extended to a case where no security at all had been deposited within the time limited by s. 11. The rules in force before the passing of the Act were not repealed thereby, see s. 22.

PHEAR, J., ordered that the appeal should be struck off the file.

Application granted.

Attorney for the respondent: The *Government Solicitor*,
Mr. *Sanderson*.

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P. C. *
1875
Nov. 17.

KRISHNA BEHARI ROY (PLAINTIFF) *v.* BUNWARI LALL ROY AND
ANOTHER (DEFENDANTS).

[On appeal from the High Court of Judicature at Fort William in Bengal.]

Act VIII of 1859, s. 2—Cause of Action—Res Judicata.

B, as adopted son and heir of *G*, instituted a suit to set aside certain putni leases, under which certain persons claimed to hold lands which had belonged to *G*. The defence was, that *B* was not the legally adopted son of *G*, and an issue on this point having been settled, *K*, who claimed to be the reversionary heir of *G*, was made a defendant under s. 73 of Act VIII of 1859; and it was eventually decided in that suit that *B* was the duly adopted son of *G*. Held, that a subsequent suit by *K* against *B* to set aside the adoption could not, on the principles laid down in the case of *Soorjeemonee Dayee v. Suddanund Mohapatter* (1), be maintained.

Kripam v. Bhagawan Das (2) overruled.

APPEAL from a decision of the High Court of Calcutta, (Kemp and Glover, JJ.), dated 4th January, 1873.

Mr. *L. W. Cave*, Q. C., and Mr. *Horace Smith*, for the appellant.

Mr. *Leith*, Q. C., and Mr. *Doyle*, for the respondents.

The facts of the case and the arguments are sufficiently stated in the judgment of their LORDSHIPS, which was delivered by

SIR M. E. SMITH.—This was a suit brought by the appellant, claiming to be the heir of Goursoonder Roy, to set aside an adoption of the respondent Bunwari Lall, alleged to have been made by the widow of Goursoonder Roy. One of the defences set up by Bunwari Lall and by his mother, who was joined in the suit as a defendant, was that the question of the validity of the adoption of Bunwari Lall had been already

* Present :—SIR J. W. COLVILLE, SIR B. PEACOCK, SIR M. E. SMITH, AND SIR
R. P. COLLIER.

(1) 12 B. L. R., 394.

(2) 1 B. L. R., A. C., 68.

decided in a former suit, to which the present appellant Krishna Behari Roy was a party. An issue was raised upon that defence. Now it appears that a former suit had occurred which was of this nature: Bunwari Lall had brought an action against some patnidars who claimed under patni leases granted by his adoptive mother. The ground on which he sought to set aside the leases was, that she had exceeded her power in granting them, inasmuch as she had only a widow's estate. It is not necessary to state more respecting the object of that suit. An issue was raised in it upon the question whether Bunwari Lall had been validly adopted. The present appellant and plaintiff Krishna Behari Roy intervened in that suit, upon the ground that he was the heir of Goursoonder Roy, and, as the heir, had a right to intervene to dispute the title of Bunwari Lall as his adopted son. It does not appear very clearly at what period of the suit that issue was raised—whether before or after Krishna Behari Roy intervened—but undoubtedly it was raised, and is in substance the same as the issue raised in the present suit. The issue was tried, and the Principal Sudder Ameen found against the intervenor and in favor of the adoption. He also found in favor of the patnidar that the patni could not be set aside. The patnidar having a decision in his favor, was, of course, satisfied with that decree; but Krishna Behari Roy being dissatisfied with the finding upon the issue as to the adoption, appealed to the Civil Judge. On this appeal the decision of the Principal Sudder Ameen was affirmed. Again he appealed from the Civil Judge to the High Court, which, after fully hearing the case upon the issue of adoption, affirmed the decisions of the Courts below. There exists, therefore, a final and complete judgment upon the issue raised either at the instance of Krishna Behari Roy, or which he adopted, on the very question which he seeks again to raise in this suit.

Both the Courts below have held that the present suit is barred by reason of the judgment in the former one. The ground of the present appeal is that they are wrong, inasmuch as it is said, that the case does not come within s. 2 of Act VIII of 1859. Now the section is this:—"The Civil

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Courts shall not take cognizance of any suit brought on a cause of action which shall have been heard and determined by a Court of competent jurisdiction in a former suit between the same parties or between parties under whom they claim." Their Lordships are of opinion that the expression "cause of action" cannot be taken in its literal and most restricted sense. But however that may be, by the general law, where a material issue has been tried and determined between the same parties in a proper suit, and in a competent Court, as to the status of one of them in relation to the other, it cannot, in their opinion, be again tried in another suit between them.

It is not necessary for their Lordships to go at length into the reasons for their decision, because those reasons appear in a recent judgment of this Board in the case of *Soorjeemonee Dayee v. Suddanund Mohapatter* (1). In that judgment it is said, after reference to the second clause of Act VIII, "Their Lordships are of opinion that the term 'cause of action' is to be construed with reference rather to the substance than to the form of action, and they are of opinion that in this case the cause of action was in substance to declare the will invalid, on the ground of the want of power of the testator to devise the property he dealt with. But even if this interpretation were not correct, their Lordships are of opinion that this clause in the Code of Procedure would by no means prevent the operation of the general law relating to *res judicata*, founded on the principle '*nemo debet bis vexari pro eadem causa*.' This law has been laid down by a series of cases in this country with which the profession is familiar. It has probably never been better laid down than in a case which was referred of *Gregory v. Molesworth* (2), in which Lord Hardwick held that where a question was necessarily decided in effect, though not express terms, between parties to the suit, they could not raise the same question as between themselves in any other suit in any other form; and that decision has been followed by a long course of decisions, the greater part of which will be found noticed in the very able notes of Mr. Smith to the case of the *Duchess of Kingston*" (3).

(1) 12 B. L. R., 304. (2) 3 Atkyns, 626. (3) 2 Smith's L. C., 6th ed., 679.

A decision of the High Court of Bengal has been referred to, the case of *Kriparam v. Bhagawan Das* (1), as having a contrary tendency. All their Lordships desire to say of it is that, as reported, it does not appear to be consistent with their judgment in the former appeal to which they have referred, nor with their opinion in the present case. The decision is of so recent a date that they desire to say no more upon it.

On reference to some notes of Mr. Broughton on this section of Act VIII of 1859, it appears that the decisions have not been uniform in the Courts in India. Several of them are opposed to that referred to.

It was suggested by Mr. Cave that the former judgment ought not to be binding, because certain witnesses having been examined before the present appellant intervened in the suit, he was refused the opportunity of cross-examining them. Their Lordships think that such an objection is no answer to the defence arising from the former judgment. If there had been any miscarriage of that kind, the matter was one for appeal in that suit. The objection does not appear to have been raised in the appeals which were successively made in that suit to the Civil Judge and to the High Court; but whether it was so raised or not, their Lordships think that they cannot affect the operation of the final judgment, which must be taken to have been rightly given.

In the result, their Lordships will humbly advise Her Majesty to dismiss this appeal, and to affirm the judgments below with costs.

Appeal dismissed.

Agents for the appellant: Messrs. *Watkins and Lattey*.

Agent for the respondents: Mr. *T. L. Wilson*.

(1) 1 B. L. R., A. C., 68. In their *Shaikh Rahmatulla v. Shaikh Sarut-ulla Kagchi*.
 Lordships' printed judgment the case referred to is incorrectly given as

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ORIGINAL CIVIL.

*Before Mr. Justice Phear.*1875
Dec. 13.

GABRIEL v. MORDAKAI (AND ANOTHER).

Succession Act (X of 1865), s. 56—Revocation of Will—Lawful Polygamous Marriage.

The will of a Jew, made subsequently to his first marriage, but previously to a second marriage in the lifetime of his first wife, *held to be revoked by such second marriage under s. 56 of the Succession Act (1).*

GABRIEL EZRA GABRIEL, a Jewish inhabitant of Calcutta, died on the 18th July, 1875, leaving two widows, Furrab Gabriel and Sarah Gabriel, and a niece, him surviving, and having duly made a will, dated the 23rd November, 1856. The testator had married his first wife in the year 1840, and his second wife, during the lifetime of the first wife, on the 21st July 1872. The executors of the will renounced probate, and an application was made by the elder widow as sole legatee named in the will for letters of administration with a copy of the will annexed. The usual citations were issued to the next-of-kin, and a special citation to the other widow and the niece of the deceased, to show cause why letters of administration should not be granted. The second widow and the niece entered a caveat, and the

(1) The question was, however, not raised whether, looking to the date of the will and the provisions of s. 331 of the Succession Act, that Act applied at all. The corresponding section (34) of the English Wills Act (1 Vic., c. 26) excludes from that Act all wills made prior to the first of January 1838—*Langford v. Little*, 2 Jo. & Lat., 613, at p. 633. All acts performed upon wills, such as alteration and cancellation, appear to be regarded as new testamentary acts, and they fall within the Wills Act, though the will itself may have been made prior to the first of January, 1838. The marriage of the testator does not fall within either of these categories, and it is doubtful what principle would be applied to such a case. In *Hobbs v. Knight*, 1 Curt., 768, at pp. 775-6, the arguments used by Sir H. Jenner involve the opinion that, for the purpose of deciding whether marriage has revoked a will, the will is not excepted by the 34th section from the operation of the Act. In *Shirley's case*, 2 Curt., 657, the same Judge subsequently decided in the contrary sense, but the case was not contested, nor was *Hobbs v. Knight*, cited by counsel.

petition for letters of administration was thereupon ordered to be treated as a plaint, and the caveators as defendants were directed to file written statements. Both the defendants in their written statements submitted that, by reason of the second marriage, the will, even if duly executed, was revoked, and that the deceased died intestate.

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v.
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The case was set down for settlement of issues, and the issue was raised whether the second marriage revoked the will?

Mr. *Jackson* for the plaintiff.

Mr. *Macrae* for the defendant Sarah Gabriel.

Mr. *Woodroffe* and Mr. *Branson* for the defendant Mordakai.

Mr. *Jackson* referred to s. 56 of the Indian Succession Act, and pointed out that the case of a second marriage in cases where such a marriage was lawful in the lifetime of the first wife, had apparently not been in contemplation of the Legislature. [PHEAR, J.—I suppose there is no doubt a Jew may lawfully marry a second time in the lifetime of the first wife.] No, that is admitted.

PHEAR, J.—I think I may say the will was revoked by the second marriage; and this will dispose of the present petition.

Attorney for the plaintiff: Mr. *Gregory*.

Attorneys for the defendants: Baboo *G. C. Chunder* and Mr. *J. O. Moses*.

Before Mr. Justice Phear.

IN THE GOODS OF WILLSON (DECEASED).

Succession Act (X of 1865), s. 258—Grant of Letters of Administration with Will annexed—Practice.

1676
Feb'y. 1.

Letters of administration with the will annexed may, under s. 258 of the Succession Act, be granted after the expiration of seven clear days from the death of the testator.

W. G. Willson died on 8th February, 1876, leaving a will, of which no executor was appointed, and there being no next-of-kin in India, an application for administration with the will annexed was made on behalf of the Administrator General on 18th February, *i.e.*, ten days after the testator's death. On a

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reference by the Registrar as to whether the issue of the grant of letters of administration should be delayed until fourteen days had expired or should be granted at once, s. 258 of the Succession Act was referred to, and the following order was made by

PHEAR, J.—I have read this section (258) as if there were a comma after the words “fourteen clear days,” and the word “respectively” after “death:” and I understand “letters of administration” not to include the case of letters of administration with the will annexed. The distinction intended by the Legislature appears to me to be this: where a will is proved, the grant may be made on the lapse of seven clear days, but where there is no will, not until after the expiration of fourteen clear days. The application may be granted.

Application granted.

Attorneys for the Administrator General: Messrs. *Chauntrell, Knowles, and Roberts.*

Before Mr. Justice Phear.

IN THE GOODS OF ROYMONEY DOSSEE.

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Dec. 20 § 22. *Will, Attestation of—Succession Act (X of 1865), s. 50—Hindu Wills Act (XXI of 1870), s. 2.*

By the Succession Act, s. 50, no particular form of attestation is necessary: therefore, where to a document purporting to be her last will and testament the name of a testatrix was written by A, and the testatrix then, in his presence, affixed her mark, and A in her presence wrote beneath it, “by the pen of A;” and the testatrix was then identified to the Registrar, who was present, by B, who had seen her affix her mark to the document, and who in her presence put his signature as having identified her, *Held* a sufficient attestation, and probate was granted (1).

APPLICATION for probate of the will of S. M. Roymoney Dossee, a Hindu inhabitant of Calcutta, dated 31st October,

(1) When a person signed a will competent as an attesting witness—for the testator, the testator merely *Asabai v. Pestonji Nanabhai*, 11 Bom. holding the pen and making no mark, *H. C. R.*, 87. it was held that such person was not

1874. The will was in the Bengali character, and bore the following signature and attestation when translated—

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OF ROYMONEY
DOSSEE.

Sree Roymoney Dossee + By the pen of Sree Jadubchunder Sen. Presented for registration between the hours of 6 and 7 A.M., on 31st October 1874, at her residence, 18 Durponarain Thakoor's Street, by Roymoney Dossee, by whom execution was also admitted.

Sree Roymoney Dossee +
By the pen of Sree Jadubchunder Sen.

"Identified by her nephew, Jogendronath Sen, clerk to Messrs. Gray & Sen, Solicitors.

Jogendronath Sen.



C. M. Chatterjee,
Registrar."

In support of the application, an affidavit of Ashootosh Mullick, Denobundhoo Sen, Jogendronath Sen, Obhoycoomar Sen, and Jadubchunder Sen, was put in, which alleged that at about 7 A.M., on 31st October, 1874, the deponents, together with the Registrar of Assurances, Baboo C. M. Chatterjee, were all present at the house of the testatrix, and then and there saw her affix her mark to a Bengali document, purporting to be her last will and testament in execution of such document, and on or immediately after such execution, presented the said document to the Registrar for registration as her last will and testament, and it was then and there admitted for registration by the Registrar on the deceased, the party executing, being identified to him by Jogendronath Sen. The signature of the Registrar appeared on the document, but it did not appear that he affixed his signature in the presence of the testatrix. Jogendronath Sen deposed that the deceased affixed her mark to the document in the presence of himself and the other deponents and of the Registrar, and that, after such execution, he duly identified the deceased to the Registrar, who thereupon

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registered the will, and that thereupon he put his signature thereto as the party identifying the deceased. He also deposed that the signature "C. M. Chatterjee" was that of the Registrar.

Jadubchunder Sen deposed that he added the last paragraph to the will by the direction of the testatrix, and that he then, by the direction of the testatrix, wrote her name at the foot or end of the will, and handed the will to her to affix her mark thereto after her name, which she thereupon did, and he then and there, in the presence of the testatrix and of the other deponents, and the Registrar, wrote under the deceased's name and mark the words বঃ জীবদেবচন্দ্র সেন, which, when translated into English, are "by the pen of Sree Jadubchunder Sen," in attestation of the fact that he had written the name of the deceased at the end of the will by her direction, and had seen her affix her mark opposite to her name in execution of the said document for her last will and testament.

Mr. *Woodroffe*, in support of the application, submitted that as the Indian Succession Act, s. 50, which is made applicable to the wills of Hindus by Act XXI of 1870, made no particular form of attestation necessary; the attestation was sufficient, and probate might be granted. [PHEAR, J.—It would be sufficient if the Registrar signed in the presence of the testatrix.] It does not appear that he did so; but even without his signature, it is submitted the attestation is sufficient. The signatures of the two persons, one of whom wrote the testatrix's name at her direction, and when she had affixed her mark, wrote "by the pen of Jadubchunder Sen;" and the other of whom saw the testatrix put her mark and identified her, writing his name as having done so, would be a sufficient attestation by two witnesses to satisfy the Act.

PHEAR, J.—Ordered probate to be granted.

Application granted.

Attorneys for the Petitioner: *Gray, Sen, and Farr.*

PRIVY COUNCIL.

CHINTAMUN SINGH (PLAINTIFF) v. NOWLUKHO KONWARI
(DEFENDANT).*

P. C.*

1875

June 30 &

July 1.

[On appeal from the High Court of Judicature at Fort William in Bengal.]

*Family Custom—Primogeniture—Mitakshara Law—Joint and Separate
Property—Impartibility.*

Although an estate be not what is technically known in the north of India as a *raj*, or what is known in the south of India as a *polliam*, the succession thereto may, under a *kulachar*, or family custom, be governed by the rule of primogeniture.

Where the family to which ancestral property held in this peculiar manner belongs is subject to the Mitakshara law, and the property is not separate, the succession, in the event of a holder dying without male issue, is given to the next collateral male heir in preference to the widow or daughters of the deceased holder.

That an estate is *impartible* does not imply that it is separate, and so to be governed by the law applicable to separate succession.

Whether the general status of a Hindu family be joint or divided, property which is joint will follow one, and property which is separate will follow another, course of succession.

Since in documents between Hindus and in the Mitakshara itself it is not unusual to find the leading members of a class alone mentioned when it is intended to comprehend the whole class, a written statement of a family custom, whereby an impartible estate passes in the event of the holder dying without issue to *his younger brother or his eldest son*, need not be construed as limiting the collateral succession to the two cases named, but as providing generally that on failure of the direct male line, the nearest male heir in the collateral line shall succeed.

APPEAL from a decision of the High Court, Calcutta (PHEAR and MORRIS, JJ.), dated 9th July 1873, dismissing the suit.

The plaintiff, Chintamun Singh, sued the defendant Nowlukho Konwari to recover possession of an estate known as the talook

* *Present*:—SIR J. W. COLVILLE, SIR B. PEACOCK, SIR M. E. SMITH, AND
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of Gungore, and of other property which had been left by Runjeet Singh, the defendant's deceased husband. The present appeal related only to the talook of Gungore.

The grounds on which the plaintiff based his claim to this talook were somewhat obscurely expressed in his plaint, but are substantially these:—He alleged that Gungore was ancestral property, belonging to a joint and undivided Hindu family governed by the law of the Mitakshara, of which he and the deceased Runjeet Singh were members; that by virtue of a custom prevailing in the family, the talook was impartible, being enjoyed by a single member of the family at a time, and devolved on the death of the holder on the eldest male heir; that Runjeet Singh, who was the last holder, having died without male issue, he, the plaintiff, being the eldest collateral male heir, was entitled to succeed to the talook to the exclusion of the widow and daughters of Runjeet Singh. He further alleged that the family custom on which he relied had been expressed and recognized in certain *ikrarnamas* executed by the grandfather of Runjeet Singh and by other members of the joint family in the year 1832.

The defendant in her written statement denied that the family was in any respect joint, and maintained that "there was no custom, usage, or *kulachar* which could negative her right and deprive her of the estate." She asserted that the only custom in the family was, that the talook was impartible and descended to an eldest son.

It appeared that the talook of Gungore, passing from father to son, according to a rule of primogeniture, had for several generations been held and enjoyed by a single member of the family; and the right thereto had been the subject of several decisions of Courts of law by which the custom was upheld; one on 17th May 1809 of the provincial Court of appeal affirming a decision of the Judge of Bhaugulpore: another in a suit brought in 1848 which was subsequently in 1852, in terms of the agreement come to in 1832 between the parties, compromised, and a decree made in terms of the compromise, under which Runjeet Singh and his heirs were to retain absolute possession of the talook of Gungore, except as to 100

bighas thereof: and a third in a suit brought in 1863 by one Rowshun Singh against Runjeet, the decision in which was subsequently affirmed by the High Court, and the suit dismissed. In that suit a written statement was filed by Chintamun the present appellant, then a co-defendant with Runjeet, in which he denied that Rowshun had any interest in Gungore, and disclaimed having any interest himself. On the death of Runjeet Singh in April 1869, his widow, Nowlukho Konwari, applied for a certificate of administration to his estate, which application, although opposed by the present appellant, was granted by the High Court in May 1870.

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The present suit was instituted in April 1871, and was tried by the Subordinate Judge of Bhaugulpore. He held that the talook of Gungore was an ancestral and undivided estate, and that the plaintiff had made out his title to succeed to it under the family custom as expressed in the deeds of 1832. As to the other property claim, he held that it was the separate estate of Runjeet Singh, and not governed by the family custom, and that it devolved under the ordinary law of succession to the defendant, the widow of Runjeet. The Judge accordingly made a decree in favor of the plaintiff as respects the talook of Gungore, but dismissed the rest of his claim.

On an appeal by the defendant from so much of this decree as related to the talook Gungore, the High Court allowed the appeal, and directed the plaintiff's suit to be wholly dismissed. Phear, J., was of opinion that, assuming that Gungore was at one time, by the operation of the family custom, impartible joint family property, yet, in the agreement in 1832, and from the documents then executed, there was evidence of a substantial separation with respect to Gungore, which was then set apart by the parties to the transaction, and allotted to the father of Runjeet as his separate property; that from the same documents it appeared that the custom in respect of Gungore was never a custom in derogation of the law, but merely a usage of the family in respect of that talook, and that, in the transaction of 1832, the parties followed the usage which had prevailed for generations in the family upon a division of the property being come to, and had moreover so acted by the express desire of

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their father. Taking into consideration the subsequent renunciation in 1852 by the father of the plaintiff, who was one of the parties to the transaction of 1832, of any interest in the talook, and the fact of the plaintiff's own admission in 1863 that he had no interest therein, he held that Gungore was the separate property of Runjeet Singh. Morris, J., held, that having regard to the manner in which Gungore had been for some generations detached from the joint estate, and to the terms of the compromises which had been come to in 1832 and 1852, there was an absolute waiver of right by the several claimants at various times, and a recognition of Gungore as a separate estate; that the renunciation of any interest by the plaintiff's father was binding on the plaintiff, and was strengthened by his own subsequent disclaimer, and that looking to the terms of the custom, inasmuch as Runjeet, the last registered proprietor, had died without male issue, or without leaving a younger brother or elder son of such younger brother, and the talook having been found to be his absolutely, his widow, and not the plaintiff, was entitled to succeed.

From this decision, the plaintiff appealed to Her Majesty in Council.

Mr. *Leith*, Q.C., and Mr. *J. D. Bell* for the appellant:—The appellant claims the talook of Gungore as against the widow of the last holder. He is the eldest male heir in the collateral line of the last holder, who died without male issue. He rests his claim partly on his general right of succession under the Mitakshara law, and partly on the family usage. With reference to this particular estate, we say that the status of the family is that of a joint and undivided Hindu family, and that, under the Mitakshara law, the widow is excluded from the succession. Under that law she can have no claim to property which is not separate. The decision in the *Shivagunga* case (1), which gave the succession to the widow, rests on the finding that the estate there in dispute was separate and self-acquired property. See also the judgment of Couch, C.J., in *Maharani Hiranath*

(1) 9 Moore's I. A., 539, see at p. 609.

Koer v. Ram Narayan Singh (1). As regards the family custom, we say that the estate is impartible, being capable of enjoyment by only one member of the family at a time; that it descends to the eldest male heir; and that it has descended according to this rule for several generations. The existence of the custom has been affirmed by repeated decisions of the Courts.

The judgment of the High Court, against which we now appeal, rests on the view that this talook was included in a partition of the family property which took place in 1832; but there is no evidence that in the transaction of that date there was any intention on the part of the members of the joint family to alter the tenure of this talook. The true construction of the instruments which were executed by the parties on that occasion is, that this talook was put aside when the rest of the estate was partitioned. There was no consideration given under that partition for the surrender of this right to Gungore by the members of the joint family.

Mr. Cowie, Q.C., and Mr. Doyne for the respondent:—The appellant relies on the Mitakshara law and on a family custom; but if Gungore be, as he alleges, a joint and undivided estate, it is unnecessary to have recourse to family custom, since, under the Mitakshara law, it would descend in the ordinary course to the plaintiff, or at any rate to the plaintiff in conjunction with the other heirs. If, however, Gungore is, as we contend, separate property, it becomes necessary for the plaintiff to show that the defendant, to whom the talook would certainly pass under the ordinary law governing the descent of separate property, is excluded by family custom.

The custom relied on, so far as it is established by evidence, amounts only to this,—that one member of the family should possess alone; that, on the death of the recorded owner, the talook should go to his eldest son, or in case he should die without issue, then to his younger brother, or his eldest son. There is no evidence of a custom beyond these limits. But the appellant is neither a son, a brother, nor a brother's son, and consequently does not come within the conditions of the custom.

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Moreover, the last recorded owner has not died without issue. He has left daughters, who are not shown to be excluded by the custom; and he has left a widow, who, as against a claimant who is not within the conditions of the custom, is entitled to inherit if the talook be separate property.

We maintain that there was in fact a partition of the family property including this talook in the year 1832, when the other members of the family relinquished all right in Gungore in favor of the then owner, which relinquishment was further confirmed in the year 1852 on the compromise of a suit brought by the father of the present plaintiff to establish his right to a moiety of the talook. Under this compromise the plaintiff's father received a certain quantity of land out of the Gungore talook, and abandoned all further claim. The result of the proceedings on these two occasions was a definition of the shares and interests of the family, which thereupon became entirely separate in estate. The property in dispute must therefore be treated as separate property. The case differs from that of *Maharani Hiranath Koer* (1) referred to by the other side, in which the family continued undivided. The judgment of the Privy Council in *Rajkishen Singh v. Ramjoy Surma Mozoomdar* (2) showed that a family custom, such as that which is now set up, may be discontinued and destroyed.

Mr. *Leith* in reply:—The case of *Rajkishen Singh* (2) shows that to destroy a custom there must be an intention to destroy it. Here no such intention can be inferred. The compromise entered into by the appellant's father in the year 1852, if intended to alter the tenure and descent of Gungore, would, under the Mitakshara, affect his own rights only. The appellant was born at that time, and is not bound by the compromise to which he was no party. But in point of fact the deed of 1832, and the compromise of 1852, reserved Gungore as joint estate. The family custom modifies the ordinary law only in so far as it selects one out of the class of heirs entitled to inherit. The words

(1) 9 B. L. R., 274.

(2) "Not reported. An endeavour will be made to procure a report for an early Part."

‘without issue,’ construed with reference to the rules of the Mitakshara, must mean without *male* issue.

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Their LORDSHIPS’ judgment was delivered by

SIR J. W. COLVILLE.—The only question raised by this appeal is whether the appellant, the plaintiff in the Courts below, or the respondent, was entitled to succeed to the property called talooka Gungore, the appellant claiming as the nearest collateral male heir of the last possessor, and the respondent claiming as the widow of the last possessor.

It was admitted on the opening of the case, and seems to have been admitted throughout the proceedings below, that the enjoyment of this talooka has long been by a single member of the family, and that it has passed from father to son according to the rule of primogeniture for several generations. The existence of this family custom has moreover been litigated at various times from a very early period, and has been affirmed by repeated decisions. By that of the 17th May 1809 it was held that the talooka was one which by custom descended according to the law of primogeniture; that it was one of those estates which were in the contemplation of the Legislature when it passed Regulation XI of 1793; and that the rights of all parties under the custom were saved to them by the fifth section of that Regulation. It seems to their Lordships too late to question what is affirmed by many reported cases, that a custom of descent according to the law of primogeniture may exist by *hulachar*, or family custom, although the estate may not be what is technically known either as a *raj* in the north of India or as a *polliam* in the south of India.

That being so, it is necessary next to consider what are the limits of the custom as established, and what would have been the course of descent of this property had the family remained wholly undivided.

There is some evidence in the *tuksimuamas* of 1832 of what the family understood to be the custom. To that reference will afterwards be made. It is to be observed, however, that if the evidence were wholly silent as to that point, the general law as

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laid down in decided cases seems to be that, where the family to which ancestral property held in this peculiar manner belongs is governed by the law of the Mitakshara, that law, in the event of a holder dying without male issue, would, if the family be undivided, give the succession to the next collateral male heir in preference of the widow or daughters of the last possessor.

The cases upon this point are collected and reviewed in the judgment of Chief Justice Couch in *Maharani Hiranath Koer v. Ram Narain Singh* (1). In the last of them, which was decided here as late as the 2nd February 1870,—viz., the case of *Stree Rajah Yanumula Venkayamah v. Stree Rajah Yanumula Boochia Vanhondora* (2),—the point which has been taken in the present case by the learned counsel for the respondent appears to have been taken by Sir Roundell Palmer and Mr. Leith, who argued for the appellants in that case. The judgment however says:—"Accordingly the strength of the argument of the learned counsel for the appellant has been directed to show that this case should be governed by *Katama Natchiar v. The Rajah of Shivagunga* (3), which is generally known as the '*Shivagunga* case.' They have gone so far as to argue that the estate in question in this case being impartible, must, from its very nature, be taken to be separate estate, and consequently that, according to the decision in the '*Shivagunga* case, the succession to it is determinable by the law which regulates the succession to a separate estate, whether the family be divided or undivided. The authority invoked, however, affords no ground for this argument. The decision in the '*Shivagunga* case will be found to proceed solely and expressly on the finding of the Court that the zemindary in question was proved to be the self-acquired and separate property of Gowary Vallaba Taver. It assumes that if this had not been so, the decision would have been the 'other way.' In that case the estate was held to pass to a very remote collateral male heir in preference to the widow of the last possessor.

(1) 9 B. L. R., 274, see at p. 319.

(2) 13 Moore's I. A., 333.

(3) 9 Moore's I. A., 539.

This authority seems to dispose of the arguments of the learned counsel for the respondent, which went to show that even while the family remained a joint and undivided family in the full sense of the term, this property would have been treated as separate property, and therefore governed by the law of the Mitakshara as to separate succession.

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It is however found as a fact, and cannot be denied, that there has been to some extent a separation of this family; and the question, therefore, is, whether this particular property after that separation lost the character which it before possessed, and became subject to a different rule of succession. According to the rule laid down by Sir William Macnaghten (*Principles of Hindoo Law*, title Partitions, vol. 1, page 53),—"If at a general partition any part of the property is left joint, the widow of a deceased brother will not participate notwithstanding the separation, but such undivided residue will go exclusively to the brother." That authority was in fact one of those upon which this board in the *Shivagunga* case decided the converse of the proposition,—*viz.*, that though a family might be undivided, the separate property of any member would nevertheless go according to the law of succession to separate estate. It in fact goes to support the proposition that, whether the general status of the family be joint or divided, property which is joint will follow one, and property which is separate will follow another, course of succession. The question, therefore, really seems to be whether by reason of the acts of the parties on the several occasions of the partial partition in 1832, and of the compromise of the suit of 1852, the plaintiff's father waived his rights of succession, or whether the parties by their joint action have impressed upon this talooka the character of separate property which must now pass according to the laws of separate succession.

(Their Lordships, after going into the terms of the transaction of 1832, continued):—If it had been intended to make this property, which had been joint, separate property, it would not have been necessary to enter into so detailed an account of the family custom or of the manner in which it had previously passed. The statement of the family custom their Lordships

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are disposed to construe very much as it was construed by the Subordinate Judge who decided this cause in the first instance. In a document between Hindus, and indeed in the Mitakshara itself, it is by no means unusual to find that the leading member of a class is alone mentioned when it is intended to comprehend the whole class. And their Lordships think that in the above statement of the family custom, it was not intended to confine the passing over of the whole, in the event of the proprietor dying without issue, to a younger brother of the deceased or his eldest son; and further, that the words "without issue" are to be taken to import "issue in the male line." Accordingly, the real effect of that definition of the family custom was, that the property was ancestral property; that though ancestral property, it was held by special custom by one person at a time, according to the rule of primogeniture, with a provision that where the direct male line failed it should then go over to the collateral lines. It has already been shown that this course of devolution was consistent with the general law. Their Lordships conceive that the partition which took place in 1832 of the other property cannot be held to have affected the character or the mode of descent of this property as thus defined.

(Their Lordships then considered the character of the compromise of 1852, and found that that transaction really amounted to no more than an agreement to waive the claim to a share in, and to the consequent right to a partition of, the talooka Gungore, and continued):—If this be so, their Lordships are further of opinion that the written statement of Chintamun Singh, which was filed in the suit afterwards brought in 1863 by Rowshun Singh, can be taken only to be a disclaimer of any interest in the talooka as claimed by Rowshun Singh in that suit, which of course, if Rowshun Singh had succeeded in establishing his claim, would have brought in Chintamun Singh as a coparcener entitled to a partition. It cannot carry the case further than the act of his father, and it seems only to be an admission that he was content to abide by whatever his father had agreed to in the earlier suit of 1852.

This being so, it seems to their Lordships that the decision

of the High Court cannot be supported, and they will humbly advise Her Majesty to reverse that decision, and in lieu thereof to decree that the decree of the Subordinate Judge be confirmed, and that the appeal to the High Court be dismissed with costs. The appellant must also have his costs of this appeal.

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Appeal allowed.

Agents for the appellant: Messrs. *Barrow & Barton.*

Agent for the respondent: Mr. *T. L. Wilson.*

JUNESWAR DASS (DEFENDANT) v. MAHABEER SINGH AND OTHERS
(PLAINTIFFS).

P. C.*
1875
Dec. 16.

[On appeal from the High Court of Judicature at Fort William in Bengal.]

Act XIV of 1859, s. 1, cls. 10, 12, 16—Limitation—Interest in Immoveable Property.

B, having borrowed money from *A*, executed in his favor a bond (which was afterwards duly registered), in which he engaged to repay the amount with interest on a day named, and hypothecated certain lands by way of security, with a condition that, in the event of the said lands being sold in execution of decree before the day fixed for repayment, *A* should be at liberty at once to sue for the recovery of the debt. Before the term for repayment expired, the mortgaged lands were sold in execution of a decree obtained by another creditor on a second bond made by *B*, subsequently and subject to the bond made to *A*. In a suit by *A* against *B* and the purchasers of the lands at the execution-sale, *A* charged *B* personally, and also sought to realize the amount due on his bond by the sale of the mortgaged lands. *Held*, that the claim was in substance a suit for the recovery of immoveable property, or of an interest in immoveable property, within the meaning of cl. 12, s. 1, Act XIV of 1859, and, consequently, was governed by the twelve years' rule of limitation therein provided, and not by the rules provided by cls. 10 and 16 of the same section.

Semble—Although *A* was at liberty to sue from the date of the sale of the lands, limitation did not run against his claim from that date, but only from the date fixed in the bond for repayment.

APPEAL from a decision of the Calcutta High Court (PHEAR and AINSLIE, JJ.), dated 11th March 1872.

* *Present*:—SIR J. W. COLVILLE, SIR B. PEACOCK, AND SIR M. E. SMITH.

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Between the years 1841 and 1851, Baboo Dyal Singh, and after his death, his son Baboo Ritbhunjun Singh, had, from time to time, borrowed sums of money from Mussamut Agur Konwar, granting her bonds for the repayment of the amount. On the 21st June 1856, Ritbhunjun Singh executed a fresh bond in substitution for the earlier bonds, which was afterwards duly registered, and in which, after reciting that a sum of Rs. 16,511, principal and interest, was due by him on the previous transactions, he bound himself personally to repay that sum with interest thereon in the month of Jeyt 1274 (June 1866), and hypothecated certain mouzahs belonging to him as security. The bond further contained a clause to this effect:—"Should the mouzahs mortgaged be sold in execution of decree or for arrears of revenue, the said lady shall in that case be at liberty, without waiting for the expiration of the term of payment, to institute a regular suit and to sell the moveable and immoveable properties of me the declarant and my heirs and thereby realize the amount in question." This bond was registered on the 23rd of June 1856.

In July 1864, one Juneswar Dass obtained a decree against Ritbhunjun Singh upon a mortgage bond executed by the latter on a date subsequent to that of the bond in favor of Mussamut Agur Konwar, and, on the 18th May 1865, the right and interest of Ritbhunjun in the aforesaid mouzahs were put up to sale in execution of that decree, and were purchased by the said Juneswar Dass and Mussamut Ruttunjote Konwar, with full notice of the incumbrance under the earlier bond.

Mussamut Agur Konwar had died in or before the year 1862. On the 30th August 1871, her representatives brought the present suit in the Court of the Subordinate Judge of Zilla Shahabad, against Ritbhunjun Singh, Juneswar Dass, and Mussamut Ruttunjote Kunwar, to recover Rs. 26,793-5-9, principal and interest, due on the bond of the 21st June 1856, by the sale of the property thereby charged, and of other property, and from the person of the defendant Ritbhunjun Singh.

The defence was (*inter alia*) that the plaintiffs' cause of action under the bond arose on the 18th May 1865, when the mouzahs were sold at the execution sale; and that, consequently,

their suit, which was not instituted until more than six years from that date, was barred by limitation.

The Subordinate Judge held, that even assuming that the plaintiffs' cause of action accrued on the 18th May 1865, the day of the auction-sale, the suit was not barred, the limitation of twelve and not of six years being applicable to a claim to enforce a lien over immoveable property by bringing such property to sale; and on appeal by Juneswar Dass from that decision the High Court affirmed the judgment of the Subordinate Judge.

Juneswar Dass then appealed to Her Majesty in Council.

Mr. *J. H. W. Arathoon* for the appellant.—On the question of limitation, both the lower Courts are wrong. Where a claim to land rests on a written contract, the period of limitation is three years—*Rani Mewa Kuwar v. Rani Hulas Kuwar* (1). [SIR M. SMITH.—That is not the effect of the judgment in that case. We held there that the claim was not founded on contract, and that the lower Court had applied a wrong rule of limitation.] Here the plaintiffs sue on a money bond in which lands are pledged as security. In such cases, where the instrument is not registered, it has been held that the limitation applicable is that of three years provided by cl. 10, s. 1, Act XIV of 1859—*Parusnath Misser v. Shaikh Bundah Ali* (2). In the present case, the contract is registered, which would give a six years' term of limitation under cl. 16 of the same section and Act—*Seetul Singh v. Sooruj Buksh Singh* (3). The plaintiffs' cause of action arose on the 18th May 1865, when the lands pledged were sold in execution, since it was provided in the bond that on such a sale the creditor might sue at once without waiting for the day fixed for payment. The suit was not brought until the 30th August 1871, more than six years from the time when the cause of action arose.

Mr. *L. W. Cave*, Q.C. (Mr. *Horace Smith* with him) for the

(1) 13 B. L. R., 312; S. C., L. R., 1 Ind. Ap., 157.

(2) 6 W. R., 132.

(3) 6 W. R., 318.

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respondents.—The cases cited from the 6th volume of the Weekly Reporter have been overruled by the Full Bench of the Calcutta High Court in the case of *Surwan Hossein Khan v. Goholam Mahomed* (1), in which it was held that a suit like the present is a suit for the recovery of an interest in immoveable property within the meaning of cl. 12, s. 1, Act XIV of 1859, and governed by the twelve years' rule of limitation; see also *Mannu Lall v. Pegue* (2). There are numerous decisions of the Madras Court to the same effect—*Raja Kaundan v. Muttammal* (3). This is not a mere suit for payment of money. Its substantial object is to enforce the lien against the defendants who bought the hypothecated lands at the execution-sale. As against them, the claim does not rest on contract. The plaintiffs have no contract with these defendants, and have no personal right against them. Even if it were held that the period of limitation is only six years, the suit would still be in time. Under the bond, the creditor had an option to sue when the lands were sold, but his proper cause of action did not arise till the day fixed by the bond for payment. The suit was brought within six years from that day.

Mr. *Arathoon* did not reply.

The judgment of their LORDSHIPS was delivered by

SIR M. E. SMITH (who having stated the facts of the case proceeded as follows):—

After the discussion which has taken place at the bar, there remain only two questions to be decided. The first is purely a question of fact. * * *

The other question arises upon the period of limitation which is applicable to this case. As already observed, the instrument contains two distinct things: the obligation to pay the money, which binds the maker of it only; and the mortgage of the land; and the plaint in the present suit is properly framed upon the instrument in that aspect. It seeks to charge the first

(1) B. L. R., Sup. Vol., 879.

(2) 9 B. L. R., 175.

(3) 3 Mad. H. C. R., 92.

defendant, the maker of the bond, Ritbhunjun Singh personally, and it also claims to recover the amount of the principal and interest by the sale of the mouzahs (naming them), which were the hypothecated property included in the mortgage. It is contended for the appellant that the limitation contained in cl. 16, s. 1 of the Act XIV of 1859 is the proper limitation to apply to the case. That is a sweeping clause, which provides thus: "that to all suits in which no other limitation is hereby expressly provided, a period of six years from the time the cause of action arose." It is said that this is a suit brought to recover money lent, and the interest on that money, and that it falls within clause 16, because, although cl. 10 applies to suits for money lent, it does not apply to them in the cases where the instrument shall have been registered within six months from the date, and this bond, having been so registered, is not within that section, and not being otherwise provided for, falls within the limitation of six years in cl. 16. Their Lordships, however, are clearly of opinion that neither of these clauses is applicable to this suit, which is brought, in substance, for the recovery of immoveable property, or of an interest in immoveable property, and falls therefore within cl. 12 of the first section. The object of the suit is to obtain a sale of the land as against the defendants grouped as defendants No. 2 and No. 3, who had become purchasers under a subsequent mortgage bond. It is, therefore, as against them, a claim founded not upon the contract to pay the money, but upon the hypothecation of the land. Their Lordships would have been disposed so to apply the Statute of Limitations if the matter had been *res integra*, but it appears from the cases to which they have been referred by Mr. Cave that there has been a long and almost uniform current of decisions in the two provinces of Bengal and Madras, giving this construction to the Act. Their Lordships must not be supposed, in coming to this decision, to give any countenance to the argument of Mr. Arathoon that this suit would have been barred if the limitation of six years under cl. 16 had been applicable to it. They think, upon the construction of this bond, there would be good reason for holding

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that the cause of action arose within six years before the commencement of the suit. However, it is sufficient to say that their Lordships think the limitation applicable to the case is that under cl. 12, s. 1 of the Limitation Act.

In the result, their Lordships will humbly advise Her Majesty to affirm the decision of the High Court, and to dismiss this appeal with costs.

Appeal dismissed.

Agent for the appellant: Mr. *T. L. Wilson*.

Agents for the respondents: Messrs. *Watkins and Lattey*.

ORIGINAL CIVIL.

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Pontifex.

IN THE GOODS OF GLADSTONE (DECEASED).

1876
March 1.

Court Fees Act (VII of 1870), Sch. I, cls. 11 & 12 — Probate Duty, Exemption from—Interest in Partnership Property.

The testator, a member of the firm of *G. A. & Co.*, of Calcutta, and *O. G. & Co.*, of Liverpool, died in England, leaving a will, of which he appointed *G* in England and *O* in Calcutta his executors. As a partner in the Calcutta firm, the testator was entitled to a share in an indigo concern and in certain immoveable property in Calcutta, and his share in these properties was, on his death, estimated, and the money-value thereof paid to his estate by the firm in Liverpool, and probate duty had been paid thereon by *G* in obtaining probate of the will in England. Shortly after the testator's death, the indigo concern was contracted to be sold, and the testator's name appearing on the title-deeds as one of the owners, *O* applied for probate of the will, to enable him to join in the conveyance and in any future sale of the other immoveable property. An unlimited grant of probate was made to *O*, who claimed exemption from probate duty in respect of the properties, on the grounds (a) that duty had already been paid in England on the testator's share in them, and (b) that there was no amount or value in respect of which probate was to be granted in India. *Held* on a case referred by the taxing officer, that *O*

was not entitled, in obtaining probate, to exemption from the probate duty payable under Sch. I, cl. 12 of the Court Fees Act, in respect of the properties.

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CASE referred by the Taxing Officer of the Court under s. 5 of the Court Fees Act (VII of 1870) for the opinion of the Chief Justice.

The case arose on the petition for probate of the will of Murray Gladstone, who was a member of the mercantile firms of Gillanders, Arbuthnot and Co., of Calcutta and Rangoon, and Ogilvy, Gillanders and Co., of Liverpool and London, who died in Wales in August 1875. By his will he appointed Robert Gladstone and J. F. Ogilvy, the present petitioner, his executors.

An unlimited grant of probate was made by Phear, J., to Mr. Ogilvy, the Executor in India, but exemption from probate duty was claimed. From the petition for probate it appeared that probate was taken out by Robert Gladstone in England, but not by the petitioner; that as a partner in the firm in Calcutta, Rangoon, and Liverpool, the testator was interested in the Otter Indigo concern in Tirhoot, and also in certain immoveable property in Calcutta, *viz.*, one-half of No. 5, Clive Street. The 6th paragraph stated that the Otter Indigo concern and share in the premises in Clive Street constituted part of the assets and capital of the partnership firms, and it had been the practice on the death or retirement of a partner, that his interest in such properties, and also in the other assets of the firms in India and elsewhere, should be ascertained by valuation or estimate, and the total amount of the share of such partner in the entire partnership assets paid to him or his legal personal representatives: and the adjustment of the account of such retiring or deceased partner was always made at the head office of the firms at Liverpool, to which particulars were supplied from all the other offices or branches of the firms, and the payments in respect of such share were always made in England, and not in India, and the annual balance sheets of the firms were also always prepared, settled, and adjusted at the head office in England. The petition further stated, that the entirety of the indigo concern was, soon after the testator's death, contracted to be sold, and that the valuation

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had been made in the usual way in Liverpool and the money paid to the estate in England, and in obtaining probate of his will Robert Gladstone had paid probate duty in respect of the testator's share in the indigo concern and the premises in Clive Street; and that probate was only now required "for the purpose of joining in a conveyance of the said premises, because the name of the testator appeared in the title-deeds relating thereto as one of the owners thereof in respect of the partnership firm of Gillanders, Arbuthnot and Co."

After stating the facts, as alleged in the petition, the case stated:—

"The petition for probate, disclosing the above facts, is supplemented by two letters from the petitioner's attorneys, one of which contains the following statement: 'The estimated value of the share of the abovenamed deceased in the capital and assets of the firms mentioned in the petition for probate has, we understand, been paid to or otherwise accounted for, and satisfied to, the executor in England. The only object in obtaining a grant here is to enable the executor here to join with the owners in the conveyance of the other indigo concern, which was agreed to be sold shortly after the death of Mr. Murray Gladstone, and also to join in any sale or dealings with the share of the firm in the Clive Street premises.'

"From this statement, taken together with the statements in the petition for probate, it would seem: (1) that the testator's share of the assets and property of the firms has been taken over by the firms; (2) that the value of the share so taken over has been received by the executor in England; (3) that the indigo concern was contracted to be sold after it had been taken over; (4) that no effectual transfer of either the house or the indigo concern can be made, except under the authority of a probate to be obtained in this country.

"Upon these facts, exemption from the payment of duty under the Court Fees Act, 1870, is claimed on the grounds: (1) that duty has been already paid in England in respect of the premises; (2) that there is no amount or value in respect of which probate is to be granted here."

With reference to the first ground of exemption, the Taxing Officer, referring to *Attorney-General v. Bouwens* (1) was of opinion, that no duty was properly payable in England in respect of these properties, and therefore that any duty paid in England in respect of the testator's share in the properties was an excess payment, of which a refund could be obtained under the provisions of 55 Geo. III, c. 184, s. 40.

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As to the second ground for exemption, the Taxing Officer observed, "that it could not be maintained that there was no amount or value in respect of which probate is to be granted here," since probate was to be granted here in respect of the share itself; and referred to the case of *The Attorney-General v. Brunning* (2).

Mr. *Shiell* for the petitioner for probate contended, that he was entitled to the exemption from probate duty claimed. The Court Fees Acts, Sch. I, cl. 12, made the duty payable when the amount or value was more than Rs. 1,000. Here the property, as far as the estate of the deceased was concerned, was of no amount or value whatever. By the arrangement, which was usual on the death of a partner as set out in para. 6 of the petition for probate, the property passed at the testator's death to the surviving partners in the firm, and the interest the deceased had when alive became property in England, on which probate duty was payable and on which probate duty has been paid. The deceased, for instance, had no interest in the property which he could have disposed of by will: nor, supposing the property which was contracted to be sold after the testator's death had increased in value between his death and the sale, would his estate have benefited by that increase. The estate was divested out of the deceased, and went to his partners. [PONTIFEX, J.—Then you don't require probate.] Probate is not required with respect to any interest the deceased had, but merely to complete a title by a conveyance to which, as his name appears in the title deeds of the property, his representatives are necessary parties. If this property had been

(1) 4 M. & W., 171.

(2) 4 H. & N., 94; S. C. on appeal, 30 L. J., Ex., 379; 8 H. L. C., 243; and 6 Jur., N. S., 1083.

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in England, probate duty, and not succession duty, would have been payable on it. [PONTIFEX, J., referred to *Custance v. Bradshaw* (1).] See *The Attorney-General v. Brunning* (2), where, as in the present case, there was a change in the nature of the property created by the arrangement between the members of the firm, and where on that ground probate duty was held to be payable. [PONTIFEX, J.—In *Custance v. Bradshaw* (1) the property does not appear to have been partnership property, as it is stated to have been in 1 Wms. on Executors, 622, 7th Ed. GARTH, C. J.—Suppose the property became money on the death of the testator, was it not money in India?] It is submitted not under the partnership arrangement. [GARTH, C. J., referred to the case of *The Attorney-General v. Bouwens* (3), where foreign bonds were held to be subject to probate duty in England.] There the bonds were from their negotiability considered as property in England. The executor as representing the testator has no such substantial interest in the property as would give a purchaser a right to require him to join in conveying it; and probate being required merely to enable him to become a formal party to a conveyance, the mere fact that the testator's name appears in the title deeds as one of the owners does not constitute an interest in him of any "amount or value" in respect of which probate duty can be said to be payable.

The *Standing Counsel* Mr. Kennedy (with him *The Advocate-General*, offg. Mr. Paul) for the Crown.—Assuming probate is considered necessary, it must be because the testator has an interest in some property in India. If duty was not payable here, it would not be payable in England; yet it has been paid there. The fact of its having been paid there does not exempt the petitioner for probate here from payment. *The Attorney-General v. Higgins* (4) was a case, where it was held that, though probate duty had been paid on certain shares in England,

(1) 4 Hare, 315.

(3) 4 M. & W., 171.

(2) 4 H. & N., 94; S. C. on appeal, (4) 2 H. & N., 339; S. C., 26 L. J., 8 H. L. C., 243; 6 Jur., N. S., 1083; Ex., 403.
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yet on probate duty being required in Scotland, probate duty was again payable. That was a case, too, where the double probate duty went to the same revenue; here it does not; see also *Attorney-General v. Dimond* (1). The duty was wrongly paid in England; the Court there had no jurisdiction to grant it in respect of this property. The proper Court was the Court here, and parties cannot, by agreement among themselves, deprive the proper Court of jurisdiction over the property in respect of which probate duty is payable. It is submitted that the deceased had an interest in real property here. Wigram, V.C., in *Custance v. Bradshaw* (2), lays down the principle that the fact of the property being partnership property makes no difference: the same results will follow. The provisions of the partnership deed cannot alter the relations of the partners with respect to the ordinary incidents of partnership property; see *Matson v. Swift* (3). Suppose this was the only asset of the deceased, would there be nothing liable to probate duty? It is submitted there would be, and it cannot make any difference that there are other assets. Where it is assumed that probate is necessary, that appears to be conclusive of the question. It is another matter whether probate is necessary.

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Mr. *Shiell* did not reply.

The opinion of the Court was as follows:—

GARTH, C.J.—In this case an unlimited grant of probate in the usual form has been granted to the executor of Mr. Murray Gladstone by Phear, J., and the only question which we have to decide is, whether any duty should be paid in respect to the two properties mentioned in the petition, *viz.*, an indigo factory in Tirhoot, and a share in the premises Nos. 5 to 8 Clive Street, Calcutta, which formed part of the partnership property of the firm of Gillanders, Arbuthnot and Co., of which the testator, Mr. Murray Gladstone, was a member. It is stated in the petition, that Mr. Murray Gladstone was one of the

(1) 1 C. & J., 356; S.C., 1 Tyr., 243.

(2) 4 Hare, 315.

(3) 8 Beav., 368.

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persons to whom both these properties were conveyed, and it is therefore necessary, in order to enable the firm to deal with them, that probate of Mr. Gladstone's will should be taken out in this country; but it is contended that no duty should be charged in respect to those properties, because, by some arrangement between the partners, Mr. Gladstone's share of the partnership assets has been paid to his estate in England, and probate duty has been paid in England upon that amount.

The question then raised by the petition has been referred to me, and I have requested Pontifex, J., to sit with me, for the purpose of hearing counsel upon it.

Having now heard Mr. Shiell's argument, we are unable to discover any reason why Mr. Gladstone's share of the properties in question should be exempt from duty. They appear to have formed part of the assets belonging to the partnership, and it may very well be that the value of Mr. Gladstone's share in them may, by some arrangement, have been paid to his estate in money by the firm; but that is no reason why they should be exempt from duty; and looking at the articles of partnership (1), a copy of which has been produced to us by the petitioner, we find no provision there which even affords a basis for Mr. Shiell's argument.

The prayer of the petition will therefore be refused, and the Crown will be entitled to the costs of the hearing.

Attorneys for the petitioner: Messrs. *Chauntrell, Knowles and Roberts.*

Attorney for the Crown: *The Government Solicitor, Mr. Sanderson.*

(1) The partnership agreement provided for the settlement and adjustment of the accounts, and the valuation of each partner's share in all the firms taking place at the head office in Liverpool, the amount of the share being placed to the credit of the partners respectively in the books of the Liverpool firm.

APPELLATE CIVIL.

Before Mr. Justice Jackson and Mr. Justice McDonell.

MATUNGEE CHURN MITTER (PLAINTIFF) v. MOORRARY MOHUN
GHOSE AND OTHERS (DEFENDANTS).*

1875
Nov. 23.

Putni Tenure, Sale of, for Arrears of Rent—Regulation VIII of 1819, s. 8, cl. 2, and s. 14—Date of Publication of Notice.

The fact that the receipt of the notice of sale was dated the 15th of Bysack, and therefore did not show that the notice had been published at some time "previous to that day," so as to satisfy the provisions of s. 8, cl. 2 of Reg. VIII of 1819, was held not to be sufficient ground for setting aside the sale of a putni tenure for arrears of rent (1). There being nothing in the receipt to show the date on which the notice was published, no injury to the plaintiff having been proved, and it appearing that more than the time prescribed by the Regulation had elapsed before the sale actually took place, the Court refused to set aside the sale.

It would not be a "sufficient plea" within the meaning of s. 14 that the receipt had been obtained, or the notification published, on, instead of previous to, the 15th of Bysack.

SUIT by the holder of a 12-anna share of a putni tenure, to set aside a sale of the tenure for default in payment of rent, upon the ground, amongst others, that the notification of sale was not published before the 15th Bysack as required by cl. 2, s. 8 of Regulation VIII of 1819. The defendants were the zemindars and the purchasers at the sale. The receipt for the service of the notification bore date the 15th Bysack, and was signed by four munduls of the village, in which the plaintiff's māl cutchery was situated. The serving peons deposed that they had served the notification of sale on the holder of the

* Regular Appeal, No. 240 of 1874, against a decree of the Subordinate Judge of Zilla Hooghly, dated the 4th of July 1874.

(1) As to how far a strict compliance with the provisions of sec. 8, cl. 2 of Reg. VIII of 1819 is necessary, see *Baihanthanath Sing v. Maharajah Dhiraj Mahtab Chand Bahadur*, 9 B. L. R., 87, and cases there cited, and *Ramsabuck Bose v. Kaminee* see *Baihanthanath Sing v. Maharajah Koomuree Dossee*, 14 B. L. R., 394.

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4 anna share on the 13th or 14th of Bysack, and that they went to the plaintiff's house on the same day, but found neither the plaintiff nor his servants there; that, on the following day, they went to the plaintiff's māl cutchery, but were unable to find either the plaintiff or his gomasta or any other servant, and that they thereupon sent for the munduls of the village, read the notice to them and affixed it to the cutchery, and obtained from them the receipt dated 15th Bysack. The sale took place on the 3rd Joisto, seventeen days after this.

The Subordinate Judge was of opinion that there was a sufficient publication of the notice, and dismissed the suit. The present appeal was then preferred by the plaintiff.

Baboo *Chunder Madhub Ghose*, for the appellant, contended that it was essential to the validity of a sale under Regulation VIII of 1819, that the provisions of the Regulation should be strictly complied with. The Collector must be satisfied that the notice was published before the 15th Bysack, whereas in the present case the receipt produced by the defendants clearly proved that it was not so published.

Baboo *Mohini Mohun Roy* and *Rash Behary Ghose*, for the respondents, contended that the object of the Regulation was to give the defaulter sufficient notice of the intended sale, and the law considered fifteen days to be sufficient; see *Haranath Gupta v. Jagannath Roy Chowdhry* (1). Here the plaintiff had had at least seventeen days' notice, and it was not pretended that he had been in any way damnified.

Baboo *Chunder Madhub Ghose* in reply.

The judgment of the Court was delivered by

JACKSON, J.—In this case, the suit was brought for the purpose of setting aside the sale of 12-anna share of a putni tenure held by the defaulter. A great number of objections, some of a frivolous kind, and some of an unjustifiable kind, have been brought forward in appeal, but the only one which deserves

notice or which was seriously pressed is that where it is contended that the notice in this case does not appear to have been published before the 15th Bysack, the sale having taken place on the 3rd Joisto following. Now, it is to be observed that the Legislature, in passing Regulation VIII of 1819, for just and equitable purposes, prescribed a variety of forms required to be gone through by zemindars, on applying for the sale of a putni tenure for arrears accrued due thereon, some part of the procedure being carried out by officers of the Collector's establishment: and one of the matters prescribed by s. 8, cl. 2, is that the Collector should be satisfied of the service of the notice, either by the receipt of the defaulter, or of his manager; or, if that cannot be procured, then by the signature of three substantial persons residing in the neighbourhood. Then it says:—"If it shall appear from the tenor of the receipt or attestation in question, that the notice has been published at any time previous to the 15th of the month of Bysack, it shall be a sufficient warrant for the sale to proceed upon the day appointed." That and other rules having been so laid down, s. 14 of the same Regulation says:—"It shall be competent to any party desirous of contesting the right of the zemindar to make the sale, whether on the ground of there having been no balance due, or on any other ground, to sue the zemindar for the reversal of the same, and upon establishing a sufficient plea to obtain a decree with full costs and damages." The meaning of that provision, as it appears to me, is, that, if the defaulter or the alleged defaulter should be able to make out that the zemindar was not in a condition to obtain the sale of his under-tenure, that there had been no balance due, or that the procedure enjoined by the Regulation had been neglected, so that the defaulter has been prejudiced by reason of that neglect, then the Civil Court is declared entitled to set aside the sale and to grant a decree to the plaintiff with full costs and damages. But it certainly would be no "sufficient plea" or substantial cause of complaint that the receipt in question had been obtained, or that the notification had been published on, instead of previous to the 15th of the month of Bysack. The law says that if it shall appear, that is, appear to the Collector, that the

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notice has been published at any time previous to the 15th of the month of Bysack, that shall be a sufficient warrant for the sale to proceed. Now, in the receipt which has been read to us in this case, the particular time of publication is not stated. The receipt is dated the 15th, and has the signatures of three substantial persons which is to be accepted only in case of inability to procure the receipt of the defaulter. It might very well be that the previous day or days had been spent in vain efforts to procure the signatures of the putnidar or his agent, and that the receipt was afterwards completed by the signatures of the munduls, obtained on the 15th of Bysack, and this might well have satisfied the Collector that the notice had been in fact published previous to the 15th. That being so, and no injury to the plaintiff being at all made out, it appears to me that the ground set up is wholly insufficient to induce this Court to set aside the sale. It may be added as it appears in this particular case that the sale, instead of taking place on the 1st of Joisto, did not take place until the 3rd, and therefore even if we assume that the publication had taken place on the 15th, still the defaulter had two days more than is prescribed by the Regulation.

The appeal is dismissed with costs.

Appeal dismissed.

ORIGINAL CIVIL.

Before Mr. Justice Phear.

KENNELLY v. WYMAN.

1876
 Feb. 14.

Practice—Inspection of Documents—Rules of High Court of 6th June 1874, 50, 52.

Where the defendant stated in an affidavit, that a schedule annexed thereto contained a list of all the documents in his possession or power relating to the suit, and a certain other document was not mentioned in the schedule, though referred to by the defendant in his written statement, *held* on the hearing of a summons to consider the sufficiency of the affidavit that the plaintiff could not cross-examine on the affidavit but could only show it was not an honest affidavit. The proper course was to apply for inspection of the particular document referred to in the written statement and omitted from the schedule, if inspection was needed.

THIS was a suit to recover arrears of salary and damages for

wrongful dismissal. On the admission of the plaint, the defendant was ordered to file a written statement, which he accordingly did. The plaintiff then obtained an order that the defendant should file an affidavit, stating whether he had any and what documents in his possession or power relating to the matters in question in the suit. The defendant thereupon filed an affidavit, and appended thereto a schedule, which he alleged contained a list of all the documents relating to the suit in his possession or power. In his written statement the defendant referred to various other documents which were not among those included in the schedule annexed to his affidavit. On the application of the plaintiff, a summons was issued by the Court to consider the sufficiency of the defendant's affidavit. The summons was supported by an affidavit filed by the plaintiff, in which the inconsistencies between the defendant's affidavit and schedule and his written statement were set forth; and it was argued that the defendant's affidavit was insufficient, inasmuch as even on the admissions in his written statement the defendant had not set out all the documents in his possession relating to the matters in suit.

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Mr. *Macrae* for the plaintiff.

Mr. *Branson* for the defendant.

The Court intimates it has considered the matter, and refers to *Wright v. Pitt* (1), and states it is clear the applicant cannot cross-examine upon the affidavit but can only show that it is not an honest affidavit. The omitted document is sufficiently mentioned and described in the written statement of the defendant, and an application can be made on that ground for inspection, if inspection is needed. Summons dismissed. Costs to be costs in the cause. The report of *Noel v. Noel* (2) was held to justify no costs being given in *Wright v. Pitt* (1).

Attorney for the plaintiff: Mr. *Hechle*.

Attorney for the defendant: Messrs. *Orr* and *Harriss*.

(1) L. R., 3 Ch. App., 809.

(2) 9 Jur., N. S., 589; S. C., 1 De Gex J. & S., 468; and 32 L. J., Ch., 676.

APPELLATE CIVIL.

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Birch.

IN THE MATTER OF THE PETITION OF LUKHYKANT BOSE.*

1875
Sept. 17.

Superintendence of High Court—24 & 25 Vict., c. 104, s. 15—Act XXIII of 1861, s. 27.

Under s. 15 of 24 & 25 Vict., c. 104, the High Court will not interfere with the decisions of the Courts below in cases in which a special appeal is forbidden by s. 27 of Act XXIII of 1861, and where there is no question of jurisdiction involved (1).

THE plaintiff's case, was, that she had gone to live with the defendant as his mistress, on the defendant executing an agreement to her to the effect that, in consideration of her living with him, he would maintain her and give her jewels and effects worth Rs. 155, and that if he did not give her the jewels and her maintenance, or if he deserted her, he was to make good the price of the jewels, Rs. 155, and give her Rs. 200 in cash. The plaintiff was deserted by the defendant, and hence her suit to recover these sums of money.

The Courts below decreed the plaintiff's suit; the Deputy Commissioner of Nowgong on appeal holding that there was nothing improper in the agreement.

On the application of the defendant, a rule was issued for the plaintiff to show cause why the decree of the Deputy Commissioner in her favor should not be set aside, and the record of the case was at the same time sent for. This rule subsequently came on for argument before Kemp, J., who decided that the contract entered into between the parties was illegal and

* Appeal under s. 15 of the Letters Patent from the order of Kemp, J., dated the 4th September 1874, in Rule No. 1054 of 1874.

(1) As to the cases in which the Courts' Act, see note to *Tej Ram v. High Court* will interfere under the *Harsukh*, I. L. R., 1 All. powers conferred by s. 15 of the High

immoral, and therefore void. The decisions of the lower Courts were therefore set aside, and the rule made absolute.

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The plaintiff appealed under s. 15 of the Letters Patent from the decision of Kemp, J., on the ground that the High Court had no power, under s. 15 of the Charter Act, to interfere with and set aside the judgments of the lower Courts in a case where no special appeal lay to the High Court.

Baboo *Bhowanichurn Dutt* for the appellant.—The High Court cannot, under the Charter Act, interfere in any case, where the suit could have been brought in the Small Cause Court, and where a special appeal is forbidden by s. 27 of Act XXIII of 1861. There is no question of jurisdiction in the case, and the lower Courts being competent to try the question of the legality of the contract, their decision was final under the law. The judgment of Kemp, J., must be set aside, and the rule discharged. See *Kurim Sheikh v. Makhoda Soondery Dossee* (1).

Baboo *Umbica Churn Bose* for the respondent.—The High Court has the power, under the Charter Act, to interfere and set the lower Courts right, where they commit any error of law. The right of appeal having been taken away in such cases by s. 27 of Act XXIII of 1861, may be the very reason why power is given to this Court in the Charter Act to superintend the lower Courts and revise their decisions when they fall into any error.

The judgment of the Court was delivered by

GARTH, C. J.—We are of opinion that this rule ought to be discharged, and the appeal against Kemp, J.'s decision allowed. It is one of those cases in which the suit might have been brought in the Small Cause Court, and s. 27 of Act XXIII of 1861 forbids any special appeal to this Court. That being so, the question is, whether the Munsif having entertained the suit and

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decided it, and the Subordinate Judge having heard it on appeal, we have any right to interfere under s. 15 of the Charter Act, not for the purpose of enquiring whether there was any jurisdiction in the lower Court to entertain the suit (about which there can be no doubt), but for the purpose of rehearing the case upon a point of law, which the Judges in the Courts below had a right and were bound to determine, and which would, if the case had been appealable to this Court, undoubtedly have been a good subject of appeal. This, as the late Chief Justice Couch very truly observed in *Karim Sheikh v. Mokhoda Soondery Dossee* (1), would be acting in direct contravention of s. 27 of Act XXIII of 1861, and usurping under this 15th clause of the Charter Act a right of appeal, which, by that 27th section, is in express terms taken away. This was a case which the Munsif's Court had clearly a jurisdiction to entertain. The question of the illegality of the contract and the question of limitation were such as the Munsiff had a right to try and was bound to try at the hearing of the suit; and questions which it was especially his province to decide: such a case, in my opinion, is not one for which cl. 15 of the Charter Act was intended to provide. The object of that section was to enable the High Court to control the lower Courts or to put them in motion, when, on the one hand, they exceed their jurisdiction, by entertaining suits which they have no right to entertain, or on the other hand refuse to exercise powers which they are bound by law to exercise. That being our view, and there being already strong authority in these Courts in favor of that view, we have no doubt whatever that this appeal should be allowed, and the rule granted by Kemp, J., discharged with costs.

Appeal allowed.

(1) 15 B. L. R., 111.

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Macpherson.

HYDER ALI (PLAINTIFF) v. JAFAR ALI (DEFENDANT).*

1875
July 15.

*Beng. Act VIII of 1869, s. 98—Suit for value of Crops—Distrain—
Jurisdiction—Small Cause Court.*

The plaintiff made a complaint to the Magistrate against the defendant, his landlord, for forcibly carrying away his crops; whereupon the defendant was tried, convicted of theft, and punished. The plaintiff then instituted a suit against the defendant in the Munsif's Court, apparently under s. 95 of Beng. Act VIII of 1869, and obtained a decree declaring the distrain to be illegal, and directing the crops to be given up to him. The defendant offered to give up a smaller quantity than was mentioned in the decree. The plaintiff refused to take the same, and brought a suit in the Small Cause Court to recover the value of the quantity he had claimed before the Munsif and something additional. *Held*, that the Small Cause Court had no jurisdiction, and that the suit ought to have been brought under s. 98 of Beng. Act VIII of 1869.

THIS was a reference to the High Court by the Judge of the Small Cause Court of Bhaugulpore in a suit brought by a tenant against his landlord under the following circumstances:—

On the 18th of March 1874, the defendant distrained certain crops belonging to the plaintiff, and on the 27th of the same month applied to the Munsif under s. 78 of the Beng. Act VIII of 1869 for an order for sale, representing that the crops had been stored on the 25th. The Munsif, on the same day, made his order under s. 80 of the Act. The plaintiff, on the same day, *viz.*, the 27th of March, complained to the Magistrate that his crops had been forcibly carried off by the defendant, whereupon the defendant was tried, convicted of theft, and fined Rs. 20.

The plaintiff then instituted a suit before the Munsif on the 13th of April, apparently under s. 95, although that section was not mentioned, and obtained a decree declaring the distrain to have been illegal, and directing the property to be given up; but

* Reference from the Small Cause Court of Bhaugulpore, dated 4th May 1875.

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 JAFAR ALI. no damages were awarded. The plaintiff then proceeded to execute his decree, but as the defendant would only make over ten maunds instead of twenty-eight maunds demanded under the decree, the plaintiff refused to take the quantity offered to him, and brought the present suit in the Small Cause Court for the value of twenty-eight maunds and something over not mentioned in the case before the Munsif.

The Judge of the Small Cause Court decided that he had no jurisdiction to try the case, and referred to the High Court the following question:—Will this suit lie? As the defendant refused to make over the whole of the distrained property, which appears to amount to a refusal to withdraw the distraint, has not the plaintiff his remedy by a suit under s. 98 of the said Act (Beng. Act VIII of 1869)?

The parties were not represented in the High Court by pleaders.

The judgment of the High Court was as follows:—

GARTH, C. J.—The Judge of the Small Cause Court is right in thinking that the Small Cause Court has no jurisdiction, as the suit is clearly one which might and ought to have been brought under s. 98 of Beng. Act VIII of 1869.

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Birch.

● 1875
 Aug. 28. ELLEM AND ANOTHER (DEFENDANTS) *vs.* BASHEER AND ANOTHER (PLAINTIFFS).*

Review—Act VIII of 1859, s. 376—Error in Law.

The production of an authority which was not brought to the notice of the Judge at the first hearing, and which lays down a view of the law contrary to that taken by the Judge, is not a sufficient ground for granting a review.

In this suit, which was one for possession of certain land, the Subordinate Judge of Sylhet delivered his judgment on 13th

* Special Appeal, No. 2331 of 1874, against a decree of the Subordinate Judge of Zilla Sylhet, dated the 4th of July 1874, reversing on review his former decree dated the 13th of June 1874, and affirming a decree of the Sudder Munsif of that district, dated the 16th of April 1874.

June 1874, dismissing the suit, and reversing the decree of the Munsif. On 4th July the plaintiffs applied to the Subordinate Judge for a review of judgment, referring as ground for their application to two cases decided by the High Court in 1869 and 1873 respectively, which were opposed to the decision given by the Judge. The Subordinate Judge, on notice to the defendants, and on looking at the cases cited, granted the review, and re-tried the case. Eventually he reversed his former decision, dismissed the defendants' appeal, and confirmed the decision of the Munsif.

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The defendants preferred a special appeal from his decision to the High Court, on the ground, among others, that the Judge had committed an error in law in admitting a review of his judgment though there was no error of law or fact in his decision, nor any other sufficient ground under s. 376 of Act VIII of 1859.

Baboo *Joy Gobind Shome* for the appellants.

Baboo *Chunder Madhub Ghose* and *Grish Chunder Ghose* for the respondents.

The judgment of the Court was delivered by

GARTH, C. J.—In this case the same question arises as in the last (1) with this difference: 1st, that the Subordinate Judge of Sylhet reviewed his own decision instead of his predecessor's; and 2ndly, that he gives as a reason for the review that he was referred by the pleader to two authorities, decided by the High Court many years ago, one of which he considered to be opposed to his former judgment. He, accordingly, made an order for the review, and reversed his previous decision.

But the case appears to us to depend upon precisely the same principle as the last, and must be decided in the same way. It is less objectionable, no doubt, in one sense, for a Judge to review his own decision than that of his predecessor's; but he has no more right to do so without sufficient reason in the one case than in the other; and we cannot consider that the production of

(1) *Beni Madhub Ghose v. Kali Churn Singh*, see *post*, p. 201 note.

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an authority to which the attention of the Judge was not called at the first trial, is sufficient ground for demanding a second trial. The parties ought to come prepared with all their materials both of law and facts, at the first hearing, and if they do not come properly prepared, they ought not to be allowed, upon discovering that they had omitted to bring forward some decided case, to try the case over again upon the strength of their own omission. If the Judge had decided improperly upon a point of law, that would be a matter for appeal, not for review (1).

The appeal will therefore be allowed; the second decision of the Subordinate Judge will be reversed, and his first decision confirmed, and the appellant will be entitled to his costs of this appeal, as well as the cost of and incidental to the review.

Appeal allowed.

PRIVY COUNCIL.

P.C.*
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 July 23, 24,
 25 &
 Nov. 26.

RAJKISHEN SINGH (PLAINTIFF) v. RAMJOY SURMA MOZOOM-
 DAR AND OTHERS (DEFENDANTS).

[On appeal from the High Court of Judicature at Fort William in Bengal.]

*Family Custom—Regs. XI of 1793 and X of 1800—Discontinuance of
 Family Custom.*

In a suit to recover possession of an estate by virtue of an alleged family custom, under which the estate was descendible to the eldest son to the exclusion of the other sons, and was impartible and inalienable, it was uncertain what the nature or origin of the tenure of the estate was, but there had been admittedly a settlement of it by Government at the time of the perpetual settlement. *Held*, assuming the custom to have existed that although by such settlement any incidents of the old tenure of the estate

* *Present*.—THE RIGHT HON'BLE SIR J. W. COLVILLE, SIR B. PEACOCK,
 SIR M. E. SMITH, SIR R. P. COLLIER, AND SIR L. PEEL.

(1) So held in a similar case, *Nobeen Poh v. Moung Tny*, 10 W. R., 143, *Kishen Mookerjee v. Shib Pershad* in which it was held that an error on a point of law may be ground for review. *Puttuck*, 9 W. R., 161; but, see *Koh*

were impliedly at an end, yet the settlement did not of itself operate to destroy the family usage, even though the origin of it could not be shown.

Quære.—Whether Regulation XI of 1793 or Regulation X of 1800 would govern a case where the claim rested only on a continuing family usage?

Held on the evidence, that from the acts of the members of the family the manner of succession to the estate, even if it prevailed as alleged, was probably not regarded by them in the light of a family custom, but as one of the incidents or conditions of tenure, and that since the settlement by Government the family had considered all these incidents at an end, and had treated the estate as an ordinary estate held under the Government, and subject to the ordinary laws of succession. Assuming the custom to have existed, it was of a nature which could, without any violation of law, be put an end to. There appears to be no principle or authority for holding that a manner of descent of an ordinary estate, depending solely on family usage, may not be discontinued either accidentally or intentionally, so as to let in the ordinary law of succession. Such family usages are in their nature different from a territorial custom, which is the *lex loci* binding all persons within the local limits in which it prevails.

THIS was an appeal from a decision of the High Court of Bengal, dated the 24th January 1865, reversing a decree of the Principal Sudder Ameen of Mymensing of the 10th January 1862.

The *Solicitor General* (Sir G. Jessel), Mr. Leith, Mr. Doyne, and Mr. W. C. Mozoomdar for the appellant.

Mr. Cowie and Mr. Bell for the respondents.

The facts and arguments are sufficiently stated in the judgment of their LORDSHIPS, which was as follows:—

This suit was originally brought by Rajah Prankishen Singh against Hurrosoondree Dabee, widow of one of his uncles Gopeenath Singh, and some purchasers from her, to recover possession, “by right of family custom,” of one-third of 14 annas of Pergunnah Soosung. Rajah Prankishen died during the progress of the suit, and the present appellant is his eldest son. Hurrosoondree is also dead; the respondents, Buroda Debia and Pranoda Debia are daughters of Gopeenath and Hurrosoondree; the respondent Gour Kishore Lahoree is their grandson, being a son of Buroda Debia.

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The plaint states that, "according to family custom prevalent in the raj or estate, the right of the plaintiff, as proprietor, accrued to the estate since the death of his father, Rajah Bishonath Singh." The claim is rested entirely on the ground of family custom, under which it is alleged that the estate was descendible on the eldest son, to the exclusion of the other sons.

It appears that the entire 16 annas of the pergunnah were at one time enjoyed by the ancestors of the family, but 2 annas were afterwards alienated, and it appears to be assumed on both sides that these 2 annas were a long time ago given as dower on the marriage of a daughter of one of the possessors.

Rajah Raj Singh, the grandfather of the plaintiff Prankishen, died in 1822, leaving three sons, Bishonath (the father of the plaintiff Prankishen), Gopeenath and Juggernath; and it is undisputed that on his death the three sons presented a joint petition to the Collector, describing themselves as the heirs of their father, and proprietors of the pergunnah, and praying to be registered, and that they were so registered for the 14 annas. Gopeenath held the one-third of the estate until his death; his widow Hurrosoondree succeeded to the possession, and when the present suit was commenced against her in 1861, Gopeenath, and she as his widow, had been in possession for nearly forty years, *viz.*, from 1822 to 1861.

The appellant contends not only that the estate is descendible on a single heir male, but also that it is impartible and inalienable. The High Court came to the conclusion that the plaintiff had failed to establish by evidence the exceptional family custom on which he relied, and reversed the contrary decision of the Principal Sudder Ameen.

The two main questions argued at the bar were—1st, Whether the family custom had been proved? and 2nd, if so, what was the effect upon it of the acts and conduct of the family on Rajah Raj Singh's death in 1822, and subsequently?

There is, undoubtedly, evidence which leads reasonably to the belief that, formerly, the estate was held, from time to time, by individual male members of the family; but the evidence leaves in obscurity the character and nature of the estate, and the tenure by which it was held under Mahomedan rule. Some

firmans and other documents, filed in a former suit, and which were sought to be made evidence in the present to show the early title, are referred to by the principal Sudder Ameen and the High Court in the following manner. The Principal Sudder Ameen says:—"It appears by a decision of the Sudder Court of the 12th May 1856, filed by the answering defendants, that the zemindari above named was formerly acquired as a jagir by Rajah Ramjibon, by a firman of the year 1650 A.D., granted by the emperor Shah Jehan, and at his death that jagir was conferred upon his son Rajah Ram Singh by a firman of the year 1680 granted by the emperor Shah Alum Ghir; and after his death it was conferred as a jagir upon Rajah Kishore Singh, son of Rajah Run Singh, by a firman of the year 1749, granted by the emperor Ahmed Shah."

The High Court, referring to these documents, say:—"It may be admitted, as held by the Judges who disposed of the case on the 12th May 1856, that there is something peculiar in this property. It is not improbable that it was, as alleged by the plaintiff, a jagir for military services, and as such held by one of the members of the family, usually the eldest son or brother, and that women were excluded from the succession, as being incapable of performing the duties required from the jagirdar. This succession, however, was not regulated by any family custom, but by the will of the sovereign power, and on referring to the judgment of 1856, we find mention made of three firmans from the Mahomedan Government, only one of which is forthcoming in the present case, which prove that the property was held as a military fief, and that the holder succeeded not by right of primogeniture, but by the will of the sovereign." And again:—"The copies of the firman, bearing date 29th Shaban (1st Juloss), of Ahmed Shah, and of the hibanamah from Ram Singh to Run Singh, cannot be looked at, no reason having been assigned for the absence of the originals, which are said to have been filed on a former occasion. The grant of Kishore Singh to Raj Singh, dated 25th Maugh, 1169, is clearly an untrustworthy document, and has only seen the light for the first time since this case was remanded; and even if genuine it proves nothing, so we are thrown

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back upon one single document, bearing date the 22nd year of the reign of Mahomed Shah, which is denounced by the opposite party to be a forgery. This document purports to be a firman from the emperor Mahomed Shah to Run Singh, confirming the jagir of Soosung to him, and requiring him to keep up a certain body of troops, consisting of cavalry and infantry. Admitting, for the moment, that this document is genuine, it really proves nothing in support of plaintiff's allegation. It does not prove the property to be raj, for no such name is used. It is termed a jagir, a tenure to be held as compensation for military service, and which might be transferred, at the will of the ruling power, to any other person on the same or different terms. The grantee, also, is not styled or in anywise recognized as a rajah, but simply as a zemindar, so that this document establishes nothing which the plaintiff seeks to prove. But, looking at the document, we have little doubt that it never came out of the royal office, either at Delhi or elsewhere. It is written on common paper, and stamped with an oval seal, which could be prepared in any bazaar of India, and nothing is shown by which we might test the genuineness of the seal."

Their Lordships find great difficulty, upon these judgments pronounced by Judges who had greater opportunities than they possess of testing the genuineness of the documents, in drawing any safe conclusion from them; and the learned counsel for the appellant felt the same difficulty, and did not press them, contending they were not material to his case. If these documents could at all be relied on, their Lordships agree with the High Court in thinking that they point to the conclusion that the estate was held under the Mahomedan rulers as a military jagir on the tenure of military service, by virtue of grants made from time to time to individual members of the family, and was not strictly an inheritable estate. If, on the other hand, reliance cannot be placed on these documents, then it is left altogether in doubt what was the original character of the estate, and the nature and conditions of its tenure.

Although much of what appears in the record, including the elaborate pedigree, must be rejected, there is still evidence that

the manner of succession, relied on by the appellant, however originating, did, in fact, prevail for some time in the family.

On the death of Rajah Kishore Singh in 1784, a perwannah was issued to his younger brother, Rajah Raj Singh, by the East India Company, who then held the grant of the Dewanny. It was addressed to him as "Zemindar of 14 annas share of Pergunnah Soosung," and states the death of the late Rajah; and goes on thus: "The Zemindari of Kismut, 14 annas of Pergunnah Soosung, which were fixed on your brother, has, according to custom, been confirmed to you." It thus appears that Rajah Kishore Singh had a living brother, and this perwannah was properly relied on as affording evidence that the deceased Rajah Kishore Singh had, notwithstanding, held the zemindari as sole possessor. Rajah Kishore had no sons, but left a widow, and the fact that she did not succeed to the zemindari, and that his brother Rajah Raj Singh was confirmed in it on his death, also points to the conclusion that the custom was supposed to prevail at the time of Rajah Raj Singh's accession in 1784. Rajah Raj Singh continued to hold the zemindari until his death in 1822. He was recognized as zemindar by the British Government at the time of the Perpetual Settlement, and the settlement of the 14 annas share of Pergunnah Soosung then was made with him at the old Peshkush (tribute), and not on a newly calculated jumma. It should, however, be observed that it appears from the accounts of the Collectorate that the other 2-anna shares, formerly severed and alienated, were settled with the zemindars, who owned them precisely in the same manner.

In the present case the estate was held directly from the Government, there being no intermediate lord. And it appears to their Lordships that, upon this settlement, any incidents of the old tenure, as a military jagir, requiring the render of services, if any such ever existed, were, as conditions of tenure, impliedly at an end; and that the zemindari, so far as relates to tenure, was thenceforth held under the Government as an ordinary zemindari free from any such conditions. The settlement would not, however, of itself, have operated to destroy a family usage regulating the manner of descent. It would

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not have had this effect in the case of a well established raj : see *Baboo Beer Pertab Sahee v. Maharajah Rajender Pertab Sahee* (1), and even in the case where the origin could not be shown, it may be assumed that it would not, of itself, affect an existing family custom.

Regulation XI, 1793, was passed soon after this settlement. That Regulation has been held not to be applicable to the succession of a well-established raj : see *Baboo Beer Pertab Sahee v. Maharajah Rajender Pertab Sahee* (1) and *Baboo Gunesh Dutt Singh v. Maharajah Moheshur Singh* (2). But the respondents contend that, notwithstanding the qualification placed upon it by Regulation X, 1800, it does govern a case like the present, where the claim rests only on a continuing family usage, and not on the peculiar character of the zemindari itself or on a local or district custom : see *Rajah Deedar Hossein v. Ranee Zuhooroon Nissa* (3). Their Lordships do not think it necessary to give any opinion on the positive effect of Regulation XI, 1793, for they think that, in the present case, there is sufficient ground for the presumption that, after the settlement and this Regulation, the family were induced to regard the former state of things, and the ancient tenures, whatever they were, as at an end, and to consider and treat the property as an ordinary estate held under the British Government; and their acts show that, in fact, they did so consider and treat it.

Their Lordships propose to refer to the most important of these acts. It has been already stated that, upon the death of Rajah Raj Singh in 1822, his eldest son Bishonath, and his two younger brothers, Gopeenath and Juggernath, presented a joint petition to the Collector. It was a public act, and the document is distinct and unequivocal in its terms. The three petitioners, who are each described as Rajah, and sons of Rajah Raj Singh, state that the raj of 14 anna shares of Pergunnah Soosung was recorded in the Serishta in their father's name, and that he being dead, "they are the heirs and proprietors of the

(1) 12 Moore's I. A., 1.

(2) 6 Moore's I. A., 164.

(3) 2 Moore's I. A., 441.

property," and they pray to be so registered, and were registered accordingly as joint proprietors.

It is plain that this was not a merely nominal petition, for there is clear evidence that the three brothers took and enjoyed in equal shares the profits of the estate. The three brothers also agreed by a document, in which they are described as "in possession and proprietors," to pay the Government revenue of 17,240 rupees. In 1829 Juggernath died, and thereupon his widow, Ranee Indromonee, was registered as joint owner with Rajahs Bishonath and Gopeenath. In April 1832, Rajahs Bishonath and Gopeenath, and the Ranee Indromonee, presented a joint petition praying for time to pay the amount of a decree obtained against them. The petition describes them as "Zemindars of the Pergunnah." Afterwards, Rajah Gopeenath died, and his widow, Ranee Hurrosoondree, was also registered as owner for his share. In 1839, and again in 1841, suits were brought against tenants by the Rajah and the two Ranees for rents due, and in 1842 a joint suit was instituted by the three for possession of part of the estate.

The transactions above enumerated show a series of important acts in dealing with the estate as joint family property, extending over a period of twenty years, all founded upon the footing that the ordinary rules of succession governed the descent.

It is now necessary to advert to some subsequent litigation. It is alleged that, in 1843, Hurrosoondree and a son she had adopted, brought a suit against Rajah Bishonath and Indromonee for a partition of the zemindari, in which the Rajah set up as a defence that the raj was impartible, and descended on the eldest male heir. It is said that this defence was successful. But the proceedings in this suit were not satisfactorily proved, and the attempt to rely on it as an estoppel failed. Other litigation followed, raising the same question, but with a different result. Indromonee, the widow of Juggernath, died, leaving an alleged adopted son, whose guardian claimed the possession for him. This was opposed by Bishonath on the ground of the family custom, but, in the end, possession was awarded to the guardian. In 1847 Bishonath commenced a regular suit to obtain the one-third share of

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Juggernath, on the ground that the alleged adoption was invalid; and also again setting up the family custom of primogeniture. In this suit, which went on appeal to the High Court, a Full Bench decided against the existence of the custom. Rajah Bishonath died in August 1853. After his death, his son, Rajah Prankishen (the plaintiff in the present suit), did not prosecute an appeal to Her Majesty in Council which had been commenced against the above decision of the High Court, but brought another suit against the guardian of this adopted son of his uncle Juggernath on the ground that the adoption was not *bonâ fide*, and claimed one-third of the estate as heir to his uncle. This suit is founded on the assumption that the custom had been negatived in the former one, for Prankishen now claimed, not on the footing of the custom, but as heir to his uncle, according to the ordinary rule of succession, and upon the ground that the adoption was not *bonâ fide*, he succeeded in the suit.

Various considerations were put forward by the learned Counsel for the appellants to destroy or diminish the effect of the facts which have just been adverted to. It was suggested that Bishonath may have allowed his brothers to take, each, one-third share for maintenance, but their Lordships are of opinion that the evidence points very clearly to the conclusion that the brothers were admitted to the possession as co-heirs and co-sharers, not on sufferance merely, but as of right. The learned Solicitor-General, indeed, admitted that the acts of Bishonath amounted virtually to a grant to his brothers of one-third shares during their lives, but he denied that they amounted to more. In their Lordships' view, however, Bishonath admitted his brothers to the succession, intending them to have full, complete, and equal ownership of the estate with himself.

It was then contended for the appellant, that if this were so, it was an attempt to do what the Hindu law would not allow.

It has already been stated that the acts of Bishonath and his brothers, on his father's death, afford strong ground for the belief that they did not regard the manner of succession, if it ever prevailed, in the light of a family custom, but as an

incident or condition of tenure which had been determined by the settlement, and consequently assumed that thenceforth the succession would conform to the ordinary law. Their conduct, indeed, goes far to disprove that a family custom, properly so called, ever existed; but assuming it to have once existed, their Lordships think it was of a nature which could, without any violation of law, be put an end to, and that it was, in fact, discontinued.

It was urged that this could not be done without the consent of the sovereign power, *viz.*, the British Government. There is no question, in the present case, of the maintenance of a raj or principality, or of a tenure differing in its general qualities from an ordinary estate under the British Government. Their Lordships are certainly not prepared to hold that descent on single male heirs was, after the settlement, a condition of the tenure on which this estate was held, requiring the assent of the sovereign power to a change in the manner of succession, and giving to the Government the right to resume the estate upon its violation. Their Lordships consider that, at the highest, no more has been alleged and proved in this case, than a family custom regulating the descent *inter se*, and which, if existing, the settlement, of itself, did not disturb.

It was also urged that the effect of the custom was to create successive life estates in the heirs male of this family, analogous to a feudal entail, which could not be barred, and which prevented alienation, or any change in the manner of descent which it was contended would be a virtual alienation. It will be collected from what has been already said, that their Lordships do not consider that such is, as a question of tenure, the nature of the estate, and in their view the family custom alleged in this case has not this effect.

Their Lordships cannot find any principle or authority for holding that in point of law a manner of descent of an ordinary estate, depending solely on family usage, may not be discontinued, so as to let in the ordinary law of succession. Such family usages are in their nature different from a territorial custom, which is the *lex loci* binding all persons within the local limits in which it prevails. It is of the essence of family

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usages that they should be certain, invariable, and continuous, and well established discontinuance must be held to destroy them. This would be so when the discontinuance has arisen from accidental causes; and the effect cannot be less, when it has been intentionally brought about by the concurrent will of the family. It would lead to much confusion, and abundant litigation, if the law attempted to revive and give effect to usages of this kind after they had been clearly abandoned, and the abandonment had been, as in this case, long acted upon. Their Lordships can have no doubt that in this case the special custom of descent, if it ever existed, was designedly discontinued after Raj Singh's death by Bishonath and his brothers—and that in fact the estate was enjoyed by the brothers and by their widows according to the ordinary law of succession, and on the footing that the custom was at an end—and not only that there was this enjoyment in fact, but that the parties were registered in the public registers, and suits were brought against third persons by the brothers and the widows, on the assumption that they were co-heirs and co-sharers of a joint family estate.

Prankishen, the plaintiff in this suit, appears at one time to have been disposed to dispute what had been done, and to set up the special mode of descent: but in the suit brought by himself against the alleged adopted son of his uncle Juggernath, already referred to, he claimed the one-third of the estate which Juggernath held, as his heir, and succeeded in setting aside the alleged adoption, and established his own right as heir to his uncle. He thus abandoned in that suit the custom which, in the present, he asserts to be still in existence. Supposing, therefore, that Prankishen had any inchoate right to the customary succession as the eldest son of Bishonath, their Lordships consider that the suit referred to affords proof of his ultimate adoption of what his father had done; and the presumption of acquiescence is strengthened by the fact that he did not prosecute the appeal in the suit brought by his father Bishonath, in which the custom had been negatived.

Their Lordships are glad to be able to uphold the judgment of the High Court, since by doing so, they confirm the posses-

sion and enjoyment of this estate as it has existed since the death of Raj Singh, and maintain the order of succession which has in fact prevailed since the settlement in 1790.

In the view which their Lordships have taken of the case it becomes unnecessary to consider the point that the suit was barred by the Law of Limitation of suits.

Their Lordships being of opinion, for the reasons above given, that the decree of the High Court ought to be upheld, will humbly advise Her Majesty to affirm it, and to dismiss this appeal with costs.

Appeal dismissed.

Agent for the appellant : Mr. *Wilson*.

Agents for the respondents : Messrs. *Watkins and Lattey*.

APPELLATE CIVIL.

Before Mr. Justice Macpherson, Offg. Chief Justice, and Mr. Justice Birch.

ROY MEGHRAJ (DEFENDANT) *v.* BEEJOY GOBIND BURRAL AND OTHERS (PLAINTIFFS).*

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Review of Judgment—Act VIII of 1859, ss. 376, 378—Power of Judge to review Judgment of his Predecessor.

A Judge has no power to allow a review of his predecessor's judgment on the ground that he comes to a different conclusion on the facts of the case. The general words used in ss. 376 and 378 of Act VIII of 1859 are controlled and restricted by the particular words, and it is only the discovery of new evidence, or the correction of a patent and indubitable error or omission, or some other particular ground of the like description, which justifies the granting of a review.

Baboo *Rash Behuree Ghose* for the appellant.

Baboo *Mohinee Mohun Roy* for the respondents.

THE facts sufficiently appear in the judgment of the Court, which was delivered by

MACPHERSON, J.—In this case it appears that upon the

* Special Appeal, No. 1863 of 1874, against a decree of the Second Subordinate Judge of Zillah Moorshedabad, dated the 1st of June 1874, affirming a decree of the Munsif of Jungipore, dated the 6th of January 1873.

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ROY MEGHRAJ Officiating Additional Subordinate Judge of Moorshedabad,
v. sitting as a Court of Appeal, reversed the decision of the
BEEJOY Munsif of Jungipore. On the 30th of May and 1st of June 1874,
GOBIND Baboo Nuffer Chunder Bhutt having ceased to hold the office of
BURRAL. Additional Subordinate Judge of Moorshedabad, Baboo Nobo
Kumar Banerjee, the second Subordinate Judge of that district,
admitted a review of the judgment of Baboo Nuffer Chunder
Bhutt, and, reversing his decision, restored and confirmed the
decree of the Munsif of Jungipore. It is objected in special
appeal that Baboo Nobo Kumar Banerjee had no power to
review the judgment of Baboo Nuffer Chunder Bhutt; that no
sufficient reason was shown for his reviewing it; and that his
proceedings ought to be set aside. For the respondent it is
contended that whether the review was rightly or wrongly
admitted, the matter is not one which can be questioned in
special appeal.

It appears from the judgment of Baboo Nobo Kumar Banerjee that he admitted the review, not upon the ground of the discovery of any new matter or evidence which was not within the knowledge of the party applying for review at the time of the original hearing, nor in order to correct any patent error or omission, nor for any other particular defect in the judgment of Baboo Nuffer Chunder Bhutt. He granted the review upon the general ground, that having gone into the case in all its details, he came to a conclusion on the facts different from that at which Baboo Nuffer Chunder Bhutt had arrived.

There is no doubt that it is an eminently unsatisfactory and inconvenient state of things, if one Judge succeeding to the office of another, is at liberty to review and rehear all the cases decided by his predecessor, and to dispose of them afresh according to the view which he may happen to take of each. It would be almost equally inconvenient that a Judge should be bound, or should be permitted, perpetually to rehear the cases which he has himself decided, upon every occasion that a party, who is dissatisfied with a decision which has been passed, chooses to ask him to go again through the evidence upon which he has already decided.

But the law, though providing for a review of judgment in certain special cases, does not, under color of a review, authorize rehearing for the purpose merely of seeing whether the Judge, on going again through the case, will arrive at a different conclusion. When a case is reheard, the Court goes through the evidence, and decides afresh upon it. But a review can be given only for certain particular reasons: and it cannot be given merely for the purpose of allowing the parties to reargue the case upon the evidence upon the chance of eventually throwing doubt on the soundness of the decision already passed. As Sir Barnes Peacock says, in the course of his judgment in the Full Bench case of *Nussiruddeen Khan* (1): "I have on more than one occasion observed that an attempt was made to obtain a review of judgment upon the ground that, upon the first hearing, the Court had determined the facts contrary to the weight of evidence. This is matter for appeal, not for a review."

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The sections of the Civil Procedure Code which deal with this subject are no doubt very loosely framed. Under s. 376, the ground upon which a review may be granted is stated to be the discovery of new matter or evidence which was not within the knowledge of the party applying for the review, or which could not be adduced by him at the time when such decree was passed, or any other good and sufficient reason. In s. 378, the grounds indicated are the correction of an evident error or omission, or its being otherwise requisite for the ends of justice. These sections show that the intention of the Legislature was that a review should be granted only on the discovery of new evidence or for the correction of some patent error or omission, or for some such cause. For example, if a deed is dated a hundred years ago, and the Judge, accidentally misreading it, thinks it is dated only twenty years ago, and decides the case accordingly; or if the Judge erroneously supposes that the witnesses all stated that the plaintiff lived at A and decides the case accordingly, whereas the witnesses all stated that he lived at Z and not at A,—in such cases, and in any other in which there has been a clear and evident slip or error on the part of

(1) B. L. R., Sup. Vol., 367.

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the Judge, a review may rightly be admitted. In short, the object of a review is, either to admit new evidence, or to enable the Judge to rectify any patent error, whether of fact or of law, into which he finds he has fallen.

Ss. 376 and 378 give no authority to a Judge, on an application for a review, to rehear the whole case upon the evidence, merely because one of the parties is dissatisfied with his original decision. It is true that in s. 376 there is a general provision that a review may be applied for by any one who, from the discovery of new evidence "or from any other good and sufficient reason, may be desirous of obtaining a 'review;' and that s. 378 says, a review may be granted if it is necessary to correct an evident error or omission or is otherwise requisite for the ends of justice." But it is a well-known rule, that in interpreting Acts of the Legislature, general words are controlled and restricted by particular words. And we are of opinion that the general words used in these two sections are controlled and restricted by the particular words; and that it is only the discovery of new evidence or the correction of an evident (*i. e.*, patent and indubitable) error or omission, or some other particular ground of the like description which justifies the granting a review. In the present case, none of the grounds specified existed, nor did any ground of the like description.

But it is contended that by s. 378 the order, whether for granting or rejecting an application for review, is final. This question, however, has practically been disposed of by the recent decision of a Full Bench in the case of *Bhyrub Chunder Surmah Chowdhry* (1). The Court there held that the parties in a special appeal are entitled to show that there has been an error or defect in procedure in the granting of the review, which has affected the decision of the case on the merits, by producing a different decision from that which has in the first instance been come to. As in that case it appeared to the learned Judges that no ground had been shown on which a review could legally be granted, so we are of opinion that in this case no ground is shown upon which a review could legally be granted.

The Judge who granted the review simply went in detail through the evidence which had previously been gone through in detail by his predecessor, differing from him apparently on every point. This was on the 30th May, when the case was in fact decided on the occasion of granting the review. The case came on formally for rehearing two days later,—i.e., on the 1st of June, when the Subordinate Judge gave judgment as follows:—
 “The respondents applied for a review of judgment, and their application was granted on the 30th of May. A copy of the reasons given there is put up with this record, and in reliance on the said reasons I confirm the judgment of the Court of first instance.”

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Nothing can be more unsatisfactory than the manner in which this case has been dealt with. If such proceedings are legal, a suit may go on for ever. In the present instance, supposing it had so happened that Baboo Nobo Kumar Banerjee had been transferred to another district shortly after the 30th of June 1874, and that Baboo Nuffer Chunder Bhutt had returned to his former office, as a matter of course Baboo Nuffer Chunder Bhutt would have been asked to review the judgment of Baboo Nobo Kumar Banerjee; and so it might have been had a stranger succeeded him.

The decisions of a Judge are entitled to be treated with respect at any rate by his successors in office, who are his co-equals in judicial position. And Baboo Nobo Kumar Banerjee forgot this rule, and acted improperly, when in admitting the review he made the general condemnatory remarks which he makes on the judgment of his predecessor.

The appeal is allowed, the order granting the review and the decree on the rehearing are set aside, and the decree of Baboo Nuffer Chunder Bhutt is restored. The appellant is entitled to his costs in this Court and in the lower Courts also (1).

Appeal allowed.

(1) This case was followed in the No. 2328 of 1874, decided by Garth, similar case of *Bani Madhub Bose* C.J., and Birch, J., on 30th August v. *Kalichurn Singh*. Special Appeal, 1875.

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Birch.

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Sept. 2.

NOBO DOORGA DOSSEE AND ANOTHER (PLAINTIFFS) v. FOYZBUX
CHOWDHRY (DEFENDANT).*

* *Res judicata*—Act VIII of 1859, s. 2—*Suit for Rent—Subsequent Suit for Abatement of Rent.*

The plaintiff obtained a putni lease of certain villages from the defendant in 1861 at an annual rent, and in 1865 was evicted from a portion of the property: she took no steps to obtain an abatement; but inasmuch as she did not pay any rent for the year 1871, the defendant brought a suit against her for the rent of that year. The plaintiff set up the defence that she was entitled to an abatement of Rs. 155 from her rent; the 155 rupees representing the annual value of the property which she had lost in consequence of the eviction. In that suit it was decided that the amount of abatement she was entitled to was Rs. 42. No appeal was made against that decision. In a suit brought by the plaintiff for the purpose of obtaining a permanent abatement of her rent, she claimed the precise measure of abatement, *viz.*, Rs. 155, which she had claimed in the suit brought against her by the defendant. *Held*, that the question was *res judicata*, it having been raised and decided in the former suit.

IN this case the defendant granted to the plaintiff a permanent putni settlement of certain villages under a lease dated in 1861, at an annual rent of Rs. 1,548 and a premium of Rs. 7,654. In the year 1865, the plaintiff was evicted from a portion of this property; whereupon she brought a suit against the defendant to recover from him a proportionate part of the premium, and certain mesne profits. For this she obtained a decree; the Court especially finding, that this decree would not affect the plaintiff's right to an abatement in her rent for the future. The plaintiff took no immediate steps to obtain any abatement; but inasmuch as she did not pay any rent for the year 1871, the defendant brought a suit against her for the rent due in that year. In that suit the present plaintiff set up as a defence, that she was entitled to an abatement of Rs. 155 from her rent, that Rs. 155 representing the annual value of the property which

* Special Appeal, No. 2546 of 1874, against decree of the Subordinate Judge of Zilla Rajshahye, dated the 24th of June 1874, affirming decree of the Munsif of Pubna, dated the 29th of August 1873.

she had lost in consequence of the eviction. On this suit coming on for trial the judge went carefully into the question of abatement; and he decided, that the amount should be Rs. 42 instead of the Rs. 155 claimed by the plaintiff. No appeal was made against that decision. The plaintiff now sued for a permanent abatement of her rent, laying the measure of abatement of Rs. 155; and the defence was that the suit was barred by the decision in the former suit.

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Baboo *Issurchunder Chuckerbutty* for the appellant.—The former judgment being on a different cause of action is no bar to the hearing of this suit. In the former case a deduction was claimed from the rent due for one year only. The matter came in question collaterally as the suit was one for rent. In this suit the plaintiff seeks to fix the rate at which he is to pay rent for future years. The deduction is on the same ground, but the cause of action in each case is a distinct and separate cause of action. In such a case a previous judgment is no estoppel. See *The Duchess of Kingston's case* (1); *Khugowlee Sing v. Hossein Bux Khan* (2); *Chunder Coomar Mundul v. Nunnee Khanum* (3); *Mussamut Edun v. Mussamnt Bechun* (4). The test is whether the same evidence would support both cases, *Hunter v. Stewart* (5), where the same question was allowed to be litigated only on a different ground. In the case of *Nelson v. Couch* (6), it was held that to constitute a good plea of *res judicata*, it must be shown that the former suit was one in which the plaintiff might have recovered precisely that which he seeks to recover in the second. The plaintiff could not have obtained what she seeks in this suit, *viz.*, an abatement for future years.

Baboo *Mohini Mohun Roy* for the respondent.—There is an estoppel in this case on the face of the facts. The plaintiff does not claim to have become entitled to a deduction on account of any alteration of circumstances since the first suit,

(1) 2 Smith's L. Ca., 6th Ed., 679.

(2) 7 B. L. R., 673.

(3) 11 B. L. R., 434.

(4) 8 W. R., 175.

(5) 8 Jur., N.S., 317.

(6) 15 C.B., N.S., 99.

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but that the abatement allowed was not properly come to. The issue there was whether the plaintiff was entitled to abatement, and if so, to what extent. It was her fault if she did not place evidence before the Munsif who tried the case, and there was no appeal. In the Full Bench case of *Chunder Coomar Mundul v. Nunnee Khanum* (1), it was held that the decision of the Collector was not binding in a subsequent suit because there was no concurrent jurisdiction, but here there is a concurrence of jurisdiction as to those matters which both the Civil Court and Revenue Court can decide. The principle upon which the abatement was claimed in the former suit for that one year is the same as that upon which it is now claimed for all future years. That decision necessarily decides in effect, though not in express terms, the very question here raised. The matter is therefore *res judicata*—see *Soorjomonee Dayee v. Suddanund Mohapatter* (2) and *Mohima Chunder Mozoomdar v. Asradha Dassia* (3). [*Baboo Issurchunder Chuckerbutty*.—That case was overruled by the Full Bench decision in *Hurri Sunker Mookerjee v. Mukhtaram Patro* (4).] In *Rakhal Das Sing v. Sreemutty Heera Motee Dossee* (5), it was decided that although the suit related to the rent of one year, the decision applied also to rent for other years. In *Mohesh Chunder Bandopadhyaya v. Joykishen Mookerjee* (6), the Munsif decided that the tenant's plea of holding being rent-free was made out. Afterwards, when the landlord sued, he was held to be concluded. The decree made by the Revenue Courts would not be binding from want of concurrence of jurisdiction, but decrees made by the Civil Court in rent suits, since the transfer of rent suits to the Civil Courts are as good as decrees in other cases under the Code.

Baboo Issurchunder Chuckerbutty in reply. — The effect of the decision in *Hurri Sunker Mookerjee v. Mukhtaram Patro* (4) is to overrule some of the previous cases on this question. No doubt, where the matter is necessarily decided in the former suit, there would be an estoppel, but the

(1) 11 B. L. R., 434.

(2) 12 B. L. R., 304.

(3) 15 B. L. R., 251.

(4) 15 B. L. R., 238.

(5) 23 W. R., 282.

(6) 15 B. L. R., 248.

matter now in dispute could not have been decided in that case either in express terms or otherwise, because the Court had no jurisdiction to try it. The decision therefore was not the decision of a competent Court.

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GARTH, C. J. (after stating the facts as above, continued):—The plaintiff brings this suit for the purpose, as she says, of obtaining an abatement of her rent for the future; and she claims in this suit the precise measure of abatement, Rs. 155, which she had claimed in the suit brought against her by the defendant. The defendant's answer is, 'this question which you now seek to raise, has already been decided between us in the former suit. You claimed the same abatement then as you do now. You attempted to establish it upon the same grounds. You went into the question, not as if the abatement were for one particular year, but for the whole remainder of your interest; and from the very nature of the question, you could not have gone into it upon any other basis.' The plaintiff's reply to this is—'no. Your claim then was for the rent of one year only; my defence must necessarily have been confined to that one year; and the result could not bind either of us for the future.' This contention raises a very nice point upon the doctrine of estoppel; as to which during the argument I confess that I personally have felt considerable difficulty.

There is no doubt as to what the law is upon the subject of estoppel. The difficulty is, in applying that law to such a case as the present. Each year's rent is in itself a separate and entire cause of action, and if a suit be brought for a year's rent, a judgment obtained in that suit, whatever the defence might be, would seem only to extend to the subject-matter of the suit; and leave the landlord at liberty to bring another suit for the next year's rent, and the tenant at liberty to set up to that suit any defence she thought proper.

But it is said, on the other hand, that in the former suit between the defendant and the plaintiff, the entire question of what ought to be the permanent abatement of rent during the whole period of the lease, was substantially and necessarily tried and determined, and that they are neither of them at liberty to reopen that question. The principle upon which the abatement

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was made, the value of the land, the measurements, and other circumstances which form the materials upon which the Judge would estimate the amount of the abatement, would be applicable to one year as well as to another, and what was a just and proper abatement for the year 1871 would be an equally just and proper abatement in each succeeding year.

There certainly appears to be great weight in this reasoning, and there is no doubt that substantial justice will be done by adopting it.

Even assuming that the judgment in the former suit were not binding between the parties as an actual estoppel, it would afford such cogent evidence between them upon the point, that the Judge in this suit (in the absence of some entirely fresh materials) would be perfectly right in acting upon it; and we cannot doubt, that if we were to send the case back to the lower Appellate Court with this intimation, the Judge would act upon it, as a matter of course; and the parties would only be put to additional expense to no purpose.

But happily, we are not without authority in this Court to guide us in coming to a conclusion. The cases which were cited in argument by the defendant's pleader—*Mohima Chunder Mozoomdar v. Asradha Dassia* (1) and *Rakhai Doss Singh v. Sreemutty Heera Motee Dossee* (2)—seem very much in point; and we think that we ought to act upon them. In one of those cases, the suit was brought by a landlord for one year's rent. The answer was, the land is rent-free—and a decree was passed against the landlord upon that ground. Another suit was afterwards brought by the landlord for another year's rent; and it was held, that as between the parties, it had been decided, that the land was rent-free; and that this decision was binding upon them not only for the one year, but for all future years.

In accordance with this, we hold that the question of abatement of rent has been determined in the former suit between these parties not only for one year 1870, but for all future years. The appeal will therefore be dismissed with costs.

Appeal dismissed.

(1) 15 B. L. R., 251.

(2) 23 W. R., 282.

ORIGINAL CRIMINAL.

Before Sir Richard Garth, Kt., Chief Justice and Mr. Justice Pontifex.

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April 10.

Evidence Act (I of 1872), ss. 25, 26, and 167—Admissibility in evidence of Confession—Police Officer also a Magistrate—Deputy Commissioner of Police in Calcutta—Letters Patent, 1865, s. 26—Case certified by Advocate-General.

The prisoner, on his arrest, made a statement in the nature of a confession which was reduced into writing by one of the inspectors in whose custody the prisoner was, and subsequently signed and acknowledged by the prisoner in the presence of the Deputy Commissioner of Police at the Police Office, the Deputy Commissioner receiving and attesting the statement in his capacity as Magistrate and Justice of the Peace. At the trial of the prisoner at the Criminal Sessions of the High Court, this statement was tendered in evidence against him, and admitted by the Judge, who overruled an objection on behalf of the prisoner that, under s. 25 of the Evidence Act, it was inadmissible. On a case certified by the Advocate-General under cl. 26 of the Letters Patent, *held*, that the confession was under s. 25 of the Evidence Act, not admissible in evidence.

Per GARTH, C.J.—S. 26 of the Evidence Act is not to be read as qualifying the plain meaning of s. 25. In construing s. 25 the term "police officer" is not to be read in a technical sense, but in its more comprehensive and popular meaning.

Per Curiam.—S. 167 of the Evidence Act applies as well as to criminal as to civil cases.

Per GARTH, C.J. (PONTIFEX, J., doubting).—The Court which under that section is to decide upon the sufficiency of the evidence to support the conviction is, in a case coming before the Court under s. 26 of the Letters Patent, the Court of review, and not the Court below. Such decision is to be come to on being informed by the Judge's notes, and if necessary by the Judge himself, of the evidence adduced at the trial.

Per Curiam.—Apart from s. 167, the Court has power, in a case under cl. 26 of the Letters Patent, to review the whole case on the merits, and affirm or quash the conviction.

HURRIBOLE CHUNDER GHOSE and Keshub Chunder Manah were tried at the February Sessions of the High Court, and were convicted by a special jury, the latter of using as genuine certain forged documents, and the former of abetting the same

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offence, and were sentenced by Macpherson, J., to ten years' transportation. During the trial, the *Standing Counsel* tendered as evidence against the prisoner Hurribole a statement made by him, in the nature of a confession, in the house of his father at Kidderpore, in the presence of two inspectors of police and the other prisoner. At the time the statement was made, the prisoners were in the custody of the police, Hurribole having shortly before been arrested under a warrant issued by Mr. Lambert, the Deputy Commissioner of Police for Calcutta. The statement was upon being made reduced into writing by one of the inspectors of police, and on the removal of the prisoners to Calcutta, it was signed and acknowledged by Hurribole as correct, in the presence of the Deputy Commissioner of Police, at his private residence over the Police Office, and Mr. Lambert signed his name beneath that of the prisoner as a Magistrate and Justice of the Peace.

The statement, on being tendered in evidence, was objected to by the Counsel for the prisoner Hurribole as being by s. 25 of the Evidence Act not admissible in evidence against him; but the objection was overruled by Macpherson, J., who held that the statement was admissible in evidence against Hurribole under s. 26. Macpherson, J., refused to reserve the point under s. 25 of the Letters Patent; but a special case was submitted to the Advocate-General, who gave a certificate under s. 26 of the Letters Patent that the point of law should be further considered, and the case accordingly came on for hearing on review under that section.

Mr. Jackson and Mr. R. Allen for the prisoner.

The *Standing Counsel* (Mr. Kennedy) for the Crown.

Mr. Jackson contended that the reception in evidence of the statement admitted was expressly barred by s. 25 of the Evidence Act, it being a confession made to a police officer. The fact that the police officer was in this case also a Magistrate does not alter the effect of the section: it does not make him the less a police officer. He cannot separate his functions as

police officer and Magistrate, and therefore was not such a Magistrate as is contemplated by s. 26. To read s. 25 otherwise would be to add to it, after the word "police officer," the words "unless he be a Magistrate," which would be making a new law, not interpreting an existing one. It is submitted further that Mr. Lambert was not a Magistrate of Police, and had no power to act as a Magistrate of Police in Calcutta. Under Beng. Act IV of 1866 there is no power given to appoint the Deputy Commissioner of Police a Magistrate of Police for Calcutta. S. 6 says,—“the Commissioner of Police shall not ordinarily be a Magistrate of Police,” but he may be appointed to that office by special sanction of the Governor General in Council. S. 7 provides for his appointment as a Justice of the Peace; “but unless he is vested with the jurisdiction of a Magistrate of Police, he shall act as a Justice only so far as may be necessary for the preservation of peace, the prevention of crimes, and the detection, apprehension, and detention of offenders in order to their being brought before a Magistrate of Police, and so far as may be necessary for the performance of the duties assigned to the Commissioner by this Act.” The section further provides that the Deputy Commissioners may be appointed Justices of the Peace; and if so appointed that are to act as Justices “subject to the above restriction.” S. 22 gives the Lieutenant-Governor power to appoint a sufficient number of fit persons to be Magistrates of Police for Calcutta: but it is submitted that the exercise of such power must be governed by ss. 6 and 7, which only provide for the appointment of the Commissioner, under special circumstances, to be a Magistrate of Police, and for the appointment of the Deputy Commissioner as a Justice of the Peace, but not for the appointment of the Deputy Commissioner as a Magistrate of Police. It would be unlikely that the Legislature intended the Commissioner to be appointed only by sanction of the Governor General, but the Deputy Commissioner to be appointed without it. If he were appointed his appointment would be illegal and void, and he could not act as a Magistrate. There is no other Act under which he could be appointed. The appointment of the Deputy Commissioner as a Magistrate of the 24-Pergun-

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nahs would not enable him to act as a Magistrate in Calcutta or make him for the purpose of this case a Magistrate within s. 26 of the Evidence Act, and even if it did, the procedure prescribed by s. 122 of the Criminal Procedure Code should have been followed before this statement would be admissible, in evidence, but that was not done.

It is submitted this was clearly a statement made to a police officer, and it was therefore not admissible. This point arose before Markby, J., in 1874, and he decided in favour of the prisoner—*Queen v. Macdonald* (1).

Mr. *Allen* on the same side.—The intention of s. 25 was totally to disable a person who is a police officer from receiving a confession, which could afterwards be used against a prisoner. [PONTIFEX, J.—Suppose the Chief of the Police in Calcutta were sitting as a Magistrate in Calcutta, do you say because he is a police officer, that a man who came before him for trial and confessed his guilt, could not be convicted and sentenced by him?] No, then he would be acting judicially; the prisoner's statement would be a plea of guilty, not a confession. [*The Standing Counsel*.—Mr. Lambert is not a member of the Calcutta Police Force; see s. 13 of Beng. Act IV of 1866.] He is a police officer; his appointment as Superintendent of Police in the mofussil is in the *Calcutta Gazette* of 24th July 1872: though he is Deputy Commissioner in Calcutta. [PONTIFEX, J.—S. 24 draws a distinction between police officer and Deputy Commissioner of Police. [GARTH, C. J.—Could the Commissioner serve a summons himself under that section?] Yes, it is submitted he could. [GARTH, C. J.—See s. 10. Under that section could the Commissioner fine or dismiss the Deputy Commissioner as being a member of the Police Force?] S. 5 gives the Lieutenant-Governor special power to dismiss him; otherwise the Commissioner would have had power. He comes under the same pension rules as other members of the force, and the time he serves as Deputy Commissioner would not be deducted. [GARTH, C. J.—Every member of the Police Force is appointed by the Commissioner, and is to receive a certificate; see ss. 10 and 13.] Special pro-

(1) Not reported.

visions are made for the appointment of the Deputy Commissioner; but that does not make him less a police officer. Besides, he would still be a police officer by virtue of his appointment of Superintendent of Police. [GARTH, C.J.—Do you say by reason of that and without express appointment or orders, he could exercise the functions of a police officer anywhere?] No, but that is not the case here. Mr. Lambert has been appointed Deputy Commissioner: that is an appointment where the duties of a police officer are brought into requisition: no doubt he was appointed as being an efficient police officer. Independently of Beng. Act IV of 1866, he is a police officer within the meaning of s. 25 of the Evidence Act.

The *Standing Counsel*.—By the appointment of Mr. Lambert to be Deputy Commissioner he ceased to be a member of the Police Force while he is in Calcutta. Mr. Roberts was appointed Police Magistrate directly from the Police Force, but he did not afterwards retain his character of police officer. As to the contention that a police officer is a police officer wherever he is, that is not so, see Act V of 1861. A police officer under s. 25 is a person authorized to exercise, and actually exercising his functions at the place where the confession is made. A person appointed police officer in the mofussil, would not be a police officer in Calcutta. [GARTH, C.J.—Suppose a man, appointed a police officer in a particular part of Bengal, were to go to another part, then taking into consideration that the Evidence Act extends over the whole of India, would a statement made to him in the latter place be inadmissible under s. 25 as being made to a police officer?] No, it is submitted it would not. The intention was to prevent confessions from being extorted by intimidation. The Commissioner and Deputy Commissioner are not police officers; the language of Beng. Act IV of 1866 is inconsistent with their being so: they have not to perform any of the duties of a police constable; the only officers of police are those enumerated in the schedule to the Act,—Form (A). The Commissioner of Police performs or did perform until a late date, much the same duties as were performed by a Magistrate of a District; Justices of the Peace exercised the executive portion of the work of a Magistrate of a District, but were not to exercise his

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judicial functions. Persons in the position of a Commissioner and Deputy Commissioner of Police, are not persons who are generally considered police officers. [PONTIFEX, J.—If a police officer were to hear a confession as a private individual in his private house, he would be bound to take notice of it, showing that you cannot separate his private and police capacities; why then should you be able to separate his police and magisterial capacities. Then again it must be taken into consideration how Mr. Lambert lives; here he lives as a police officer among police, not as a Magistrate.] It is submitted his police functions are merged in his magisterial ones: his duties and functions are magisterial and judicial; in this case he issued a search warrant, which is a magisterial act. Under the old Criminal Procedure Code, Act XXV of 1861, the Commissioner of Police had to exercise judicial functions; see s. 84 which provides procedure to be adopted on the arrest within the local limits of the jurisdiction of the Supreme Court of a person against whom a warrant is issued by a Magistrate. Under that section, if the argument of the other side is to prevail, if a prisoner were taken before a Magistrate of Police, a confession made by him would be admissible; but if he were taken before the Commissioner of Police, it would not; see also s. 87. Ss. 84 to 100, taken with ss. 148 and 149, show what were the police officers meant by the latter sections which are in the same terms as ss. 25 and 26 of the Evidence Act. If Mr. Lambert were only a Justice of the Peace, he would still be a Magistrate within the meaning of s. 26 of the Evidence Act; any person, who was a Justice of the Peace, would come under that meaning. A confession as in this case made to him in both characters must be taken to have been made to him as a Magistrate, his character as a police officer being merged in that of Magistrate.

GARTH, C. J., intimated that the Court was of opinion that the statement was not admissible in evidence, and ought to have been rejected: but that Macpherson, J., had given a certificate that without the statement there was sufficient evidence to justify the conviction.

Mr. *Jackson* then contended that if the statement had been

improperly received in evidence, the prisoner was entitled to an acquittal. The case cannot be sent back, but under s. 26 of the Letters Patent must now be decided by this Court, if at all. But it cannot be decided at all; s. 167 of the Evidence Act, which provides that "the improper admission or rejection of evidence shall not be ground of itself for the reversal of any decision in any case," does not apply to a criminal case tried by a jury, but only to case where the matter has been decided by a Judge without a jury. The Criminal Procedure Code, Act X of 1872, makes special provisions as to the improper admission of evidence in trials by jury; see s. 283. And s. 280 gives the Appellate Court power to pass any order it thinks fit: s. 283 was unnecessary if s. 167 of the Evidence Act applied. In *Reg. v. Navroji Dadabhai* (1), the applicability of s. 167 to such cases as this was raised, but the question was only fully gone into by one of the Judges, Bayley, J., and was not made a ground of their decision by Sarjent, C.J., and Green, J., though they adverted to it. Bayley, J., gave a strong opinion that the section was not applicable to such a case as this. The word 'decision' in that section is inapplicable to the verdict of a jury. It seems to have been admitted that the Court of Review was the proper Court to decide on the sufficiency or otherwise of the evidence. [GARTH, C.J.—That point was not raised.] No, but it was not suggested that the Court before whom it was argued was not the proper Court after long argument on all points. [PONTIFEX, J.—It appears to me clear the other way, viz., that the Court in s. 167 means the Court that tried the case. [GARTH, C.J.—In that case the Judge who tried the case was one of the three Judges before whom the case was heard on review.] Yes, and he delivered a fresh judgment as one of the Court of Review. This case differs in that it is one certified by the Advocate-General, not reserved by the Court. It is submitted that s. 167 does not apply to criminal trials at all; the section is identical with s. 57 of Act II of 1855, which has never been applied to criminal trials. The words are "the Court before which such objection is "not *was* raised." It does not apply to cases tried by a jury: it would be impossible to say what the

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result on the minds of the jury would have been, if the evidence improperly admitted had not been before them. The prisoner ought to be discharged.

Mr. *Allen* followed on the same side.

The Court took time to consider their judgment, and on a subsequent day called on Mr. *Ingram*, who then appeared with the *Standing Counsel* for the Crown, on the point as to s. 167 of the Evidence Act, but the learned Counsel said he thought it was unnecessary for him to argue the point.

The following judgments were delivered:—

GARTH, C. J.—In this case, the prisoner Hurribole Chunder Ghose was tried and convicted, at the February Sessions of the High Court, for using certain forged documents, and sentenced to ten years' transportation. At the trial before Macpherson, J., it was proposed on the part of the prosecution to put in a confession made by the prisoner. The confession was made, in the first instance, to two policemen, and taken down in writing, and the prisoner was then brought before the Deputy Commissioner of Police, Mr. Lambert, at the Police Office in Calcutta, where he again affirmed the truth of his former statement to Mr. Lambert, and Mr. Lambert, in his capacity of a Magistrate, received and attested the statement.

Upon this confession being tendered in evidence, it was objected to by the prisoner's Counsel, upon the ground that it was a confession made by the prisoner to a police officer, and therefore not admissible, by reason of the 25th section of the Evidence Act (I of 1872). In answer to this objection, it was urged on the part of the prosecution, 1st, that Mr. Lambert was not a "police officer" within the meaning of the section; 2nd, that, if he were, the statement was made to him as a Magistrate, and not as a police officer; and that the 26th section was intended to qualify the 25th, so as to make a statement even to a police officer admissible, if made in the presence of a Magistrate. The learned Judge at the trial admitted the evidence, and declined to reserve the point; but the Advocate-General having since given a certificate, under s. 26 of the

Letters Patent of the High Court, that the point was a proper one to be considered, it has been brought before this Court for review, and has been well and fully argued before us.

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It was urged by Mr. Jackson, for the prisoner, that the terms of s. 25 are imperative; that a confession made to a Police officer, *under any circumstances*, is not admissible in evidence against him, and that the 26th section is not intended to qualify the 25th, but means that no confession made by a prisoner in custody, to any person other than a police officer, shall be admissible, unless made in the presence of a Magistrate. I am of opinion that this is the true meaning of the 25th section. Its humane object is to prevent confessions obtained from accused persons through any undue influence, being received as evidence against them. It is an enactment to which the Court should give the fullest effect, and I see no sufficient reason for reading the 26th section so as to qualify the plain meaning of the 25th.

But then comes the question whether Mr. Lambert was a police officer within the meaning of s. 25. It was argued, and with some force, that the term "police officer" did not mean a Deputy Commissioner of Police; that it comprised only that class of persons who are called in the Bengal Police Act (Beng. Act IV of 1866) "members of the Police Force;" and that the object of the Evidence Act was not to prevent a gentleman in Mr. Lambert's position from taking a confession, but only ordinary members of the Police Force, who are personally and constantly engaged in the detection of crime and the apprehension of offenders.

There is no doubt that, looking at the various sections of Beng. Act IV of 1866, the Deputy Commissioner of Police is not a member of the Police Force within the meaning of that Act, and, moreover, on looking back to the Police Act of 1861, it will be found that the term "police officer," as used in that Act, has generally the same meaning as a member of the Police Force in the Act of 1866; but in construing the 25th section of the Evidence Act of 1872, I consider that the term "police officer" should be read not in any strict technical sense, but according to its more comprehensive and popular meaning.

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In common parlance and amongst the generality of people, the Commissioner and Deputy Commissioner of Police are understood to be officers of Police, or in other words "police officers," quite as much as the more ordinary members of the force; and, although in the case of a gentleman in Mr. Lambert's position, there would not be, of course, the same danger of a confession being extorted from a prisoner by any undue means, there is no doubt that Mr. Lambert's official character, and the very place where he sits as Deputy Commissioner, is not without its terrors in the eyes of an accused person; and I think it better in construing a section such as the 25th which was intended as a wholesome protection to the accused, to construe it in its widest and most popular signification.

I am of opinion, therefore, that the confession made by the prisoner in this case ought not to have been admitted at the trial.

But then comes the further very important question, what should be the effect of this improper admission of evidence on the proceedings? The 167th section of the Evidence Act provides that "the improper admission of evidence shall not be ground of itself for the reversal of any decision in any case, if it shall appear to the Court before which such objection is raised that, independently of the evidence objected to and admitted, there was sufficient evidence to justify the decision;" and I was certainly disposed to think, before hearing Mr. Jackson's argument, not only that this section applied to criminal as well as civil cases, but that the Court which had to determine whether, independently of the evidence objected to, there were sufficient materials to justify a conviction, was the Court below, before which the case was originally tried; and, upon this assumption, my learned colleague and I consulted Macpherson, J., who certified that there was ample evidence in the Court below, independently of the admission, to justify the conviction in this case.

Mr. Jackson, however, desired to be heard upon the effect of s. 167, and he had urged upon us,—first, that the section does not apply at all to criminal cases, and, secondly, that, if it does, the Court to determine whether the conviction ought to stand, is not the Court which tried the case, but the Court

before whom the point of the admissibility of the evidence was argued. Mr. Jackson insisted that the word "decision" used in s. 167 was one inapplicable to a criminal case tried on the original side of this Court, and that it never could have been intended by the Legislature that a case triable by a jury, and of the facts of which a jury alone are the proper judges, should be virtually re-tried by any Court not consisting of a jury; and in aid of his argument, he cited the case of *Reg. v. Navroji Dadabhai* (1).

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I am unable, however, to discover any sufficient reason why the 167th section of the Evidence Act should not apply to criminal as well as civil cases. It is perfectly true that the word "decision" is more generally used as applicable to civil proceedings, but it is by no means inappropriate to criminal cases; and, if it was the intention of the Legislature to use an expression which would apply equally to civil as to criminal proceedings, there is probably no other word which would have answered their purpose better. Many other provisions of the Evidence Act apply equally to all judicial enquiries, and, if the nature of the mischief which the section was intended to remedy is considered, there is at least as much reason why it should apply to criminal as to civil proceedings. The Court have no power in a criminal case to order a new trial, and, if, in each instance, where evidence is improperly admitted or rejected, the conviction is to be quashed, a lamentable failure of justice would often be the consequence.

I am of opinion therefore that s. 167 does apply to criminal cases, but, upon consideration, I think that the Court mentioned in that section which is to decide upon the sufficiency of the evidence to support the conviction is the Court of Review, and not the Court below. The point is certainly "raised," properly speaking, in the Court below, but it is both raised and argued in the Court of Appeal, and we think that the proper course of proceeding is for the Court of Appeal to decide upon the case, upon being informed from the Judge's notes, and, if necessary by the Judge himself, of the evidence adduced at the trial.

(1) 9 Bom. H. C. R., 358.

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Apart, however, from s. 167 of the Evidence Act, I think that, under s. 26 of the Letters Patent, by virtue of which this case has been submitted to us for review, we have a right either to quash or to confirm the conviction, as we may think proper. The section enables the Court, after deciding upon the point reserved or certified, to pass such judgment or sentence as it may think right. If, therefore, upon reviewing the whole case, we are of opinion that, upon the evidence properly received, there is sufficient ground to convict the prisoner, I consider that we ought to allow the conviction to stand. In the present case, therefore, we have obtained copies of the Judge's notes at the trial, and have also obtained information from the Judge as to what particular portion of the evidence applied to the prisoner Hurribole Chunder Ghose, and we are now prepared to hear the case argued upon its merits, as to whether there is sufficient evidence, apart from that improperly admitted, to support the conviction.

PONTIFEX, J.—I also am of opinion that the confession made by the prisoner in Mr. Lambert's presence ought not to have been admitted at the trial. Without going so far as to say that s. 25 of the Evidence Act renders inadmissible a confession made to any person connected with the police, for there are cases in which a person holding high judicial office has control over and is the nominal head of the police in his district, I think that, in the present case, it was impossible for Mr. Lambert, residing in the house allotted to him as Deputy Commissioner of Police, and surrounded by police immediately under his control, to divest himself of his character of a police officer. I also agree that, under cl. 26 of the Letters Patent, which clause deals with cases tried before a jury, we are bound to consider the admissible evidence in this case, and to pass such judgment and sentence as we shall think right, and I come to this conclusion without reference to s. 167 of the Evidence Act.

I agree that such last mentioned section is applicable to criminal trials, but I have some doubt whether, if we were proceeding under it alone, we should be the proper Court to

consider the sufficiency or insufficiency of the evidence in relation to the verdict (1).

Attorney for the Crown: The *Government Solicitor*, Mr. *Sanderson*.

Attorney for the prisoner: Mr. *Carruthers*.

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APPELLATE CRIMINAL.

Before Sir Richard Garth, Kt., Chief Justice, Mr. Justice L. S. Jackson, Mr. Justice Macpherson, Mr. Justice Pontifex, and Mr. Justice Morris.

THE QUEEN v. ZUHIRUDDIN AND OTHERS.

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March 23.

Criminal Procedure Code (Act X 1872), s. 64—Power of Judge acting in English Department.

An application for the transfer of a case under s. 64 of the Criminal Procedure Code should be made, not by letter to the English Department of the High Court, but before the Court in its judicial capacity, and should be supported by affidavits, or affirmation in the usual way.

THE Assistant Magistrate of Patna by an order dated the 10th of February 1876, committed the accused for trial by the Sessions Judge of Patna, on the charge of having on the 5th of June 1875 committed murder and cognate offences, alleging in the order of commitment that the delay in bringing them to justice was caused by the undue influence exercised by the accused in the district. On this ground he applied, through the District Magistrate, to the High Court for an order under s. 64 of Act X of 1872 transferring the case to some other district. A copy of the grounds of commitment was furnished

(1) The Counsel for the prisoner then went through the evidence to show that it was insufficient, apart from the confession, to justify the conviction being upheld. A certificate by a majority of the jury who tried the case, to the effect that if the confession had not been in evidence they would have given a verdict of acquittal, was tendered, but was rejected by the Court. The Court took time to consider their judgment, and eventually upheld the conviction on the evidence.

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to the accused on the 20th of February. The application to the High Courts to transfer the case was made by the District Magistrate by letter directed to the Registrar of the High Court, who placed it before Jackson, J., sitting in the English Department, who thereupon, without notice to the accused, made an order transferring the case from the Sessions Judge of Patna to the Sessions Judge of Shahabad. The trial before the Sessions Judge of Patna would have been by a jury, while that at the Sessions Court at Shahabad would be by the Judge with assessors.

On the above facts, *Mr. Evans* applied for a rule calling on the Crown to shew cause why the order should not be quashed on the ground that it had been made without jurisdiction, and was not a valid exercise of any power vested in the Court, and moreover was made without notice to the accused, and without any proper application to the High Court on proper and sufficient grounds.

The application was made before GARTH, C. J., and PONTIFEX, J., who ordered a rule to be issued in terms of the application.

Mr. Macrae (The Junior Government Pleader, Baboo Juggodanund Mookerjee with him) on behalf of the Crown now appeared to show cause, and contended that there was no necessity for giving any notice to the accused before making the order, no such procedure having been suggested by the Legislature: and after referring to s. 297 of the Criminal Procedure Code (Act X of 1872), which authorizes the High Court to commit for trial an accused person improperly discharged when such matter should "come to its knowledge" when such person had not the right to be heard, argued, that it might fairly be contended that the High Court having such large powers, the Legislature did not require notice to be given in the lesser matter of transferring cases. (GARTH, C. J.—When an order, if made, will affect an accused person, I certainly think he should have notice before it is made, PONTIFEX, J.—In cases coming before the High Court under s. 297 of the Criminal Procedure Code, the evidence has at a former stage already been taken in the presence of the

accused person.] The learned Counsel further argued from the fact, that the power of transferring cases under ss. 63 and 64 was possessed by the Governor-General in Council and by the Lieutenant-Governor, for whom it would be impossible to follow the procedure demanded on behalf of the prisoners, the transfer was made administratively. By s. 13 of the Charter Act, the powers of the High Court may be exercised by one Judge under the rules of 4th June 1867; see Broughton's Civil Procedure Code, p. 704. Therefore, if the matter be non-judicial and affecting the administrative and executive authority only, such a Judge has power to dispose of it himself. [PONTIFEX, J.—Will cl. 36 of Letters Patent enable a single Judge to perform functions under s. 64 of Act X of 1872?] Cl. 13 confers judicial powers on the High Court; cl. 15 confers administrative power; the power to transfer cases is conferred by the latter section as belonging to the administrative rather than judicial acts of the Court.

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Mr. *Woodroffe* (Mr. *Evans* and *Moonshee Mahomed Yusoof* with him) in support of the rule.—Even if in point of form the letter sent by the Registrar be an order of the High Court, the High Court cannot issue an order administratively, and if it could so issue it, the English Department has not the power to issue such an order; the High Court, when it makes an order under s. 64, acts judicially and not administratively. The Legislature could not have intended to confer power of such an unparalleled character as to allow it in certain cases to act both administratively and judicially. S. 520 of the Criminal Procedure Code is the only section under which the High Court has power to make an order not judicial. The considerations which would move the Governor-General in Council are different from those which would move the High Court. No argument can be deduced from ss. 63 and 64A to support the contention that the powers exercised by the High Court are other than judicial proceedings. There is nothing to show that an order under s. 64, made by High Court, is anything other than a judicial order. Any person liable to be prejudicially affected by an act of the Legislature has the right to have an opportunity of defending himself, unless such right has been expressly restricted; see

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Maxwell on the Interpretation of Statutes, p. 325. The powers of revision given to the High Court by s. 297 are with reference to matters judicial; see *The Queen v. Bundoo* (1). The Court can only act on matter brought before the Court in the regular way by the prosecution or by the defence; not on information obtained from other sources, as newspapers, letters, &c. Applications in other cases have been made by the accused for transfer of cases, but these have always been treated judicially. Some of them have been so treated by Macpherson, J. and Pontifex, J. We have not been able to discover a single instance of an application such as this being made by the accused person to the English Department. [JACKSON, J., referred to three cases in which the application was made on behalf of the accused to the English Department.] Those are cases where the applications were made possibly in the interest of the accused, but not by him, but by the Magistrate on account of his being connected with the case as either a witness or prosecutor. The learned Counsel referred to the *Queen v. Pogose* (2), a case in which an application made by the Judge of Dacca to the English Department to transfer the case from that district, had been refused on the ground that it could not be dealt with administratively, and asked the Court to send for the papers in the case.

On the re-assembling of the Court on the following day, the following judgments were delivered:—

GARTH, C.J.—I am happy to say, that since last evening, some papers have been discovered, which will render any further discussion of this rule unnecessary.

It appears, that in 1869, in a case which in its circumstances very closely resembled the present, it was decided by no less than nine Judges of this Court, that the proper course was to apply to the Court, sitting in its judicial capacity upon affidavits, in the usual way; and I am extremely glad to find that no less distinguished a Judge than Mr. Justice Louis Jackson, was one of the Judges who took part in that decision (3).

(1) 22 W. R., Cr., 67.

(2) Not reported.

(3) This was the case of *The Queen v. Pogose* referred to by Mr. Woodroffe.

An application in that case was made by Mr. Herschel, the Officiating Sessions Judge of Dacca, to the Registrar of this Court, suggesting that an order should be obtained for the transfer of the proceedings to the High Court for trial. I will read his letter, dated the 11th of June 1869.

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"I have the honor to request that you will lay before the Hon'ble Judges of the High Court the following circumstances and solicit orders thereon for me. The Magistrate of Dacca has committed the four principal Armenian residents of this city on a charge of misappropriating a large sum of money, the property of the wealthiest Armenian of Dacca, on his decease. The charge is brought on behalf of Government on the motion of the Educational Department, who claim the money as intended for a school. Technically the Government is prosecutor also under s. 68. The case is as important a case as well could occur in the eyes of the educated classes of Dacca; and the decision of it is naturally looked forward to with great interest. But it appears to me advisable that it should be tried at Calcutta, and not here. My Jury list is very ill adapted for such a case (1).

Upon this letter being received by the Registrar, it appears to have been laid before the Chief Justice, Sir Barnes Peacock, who recorded upon it, the following minute:—"It appears to me that the Court ought not to interfere upon the application of the Sessions Judge made by letter. If Government (or the prosecutor, if the case is not prosecuted by Government), or any of the accused think fit to apply to the Court by motion supported by affidavit or affirmation, the Court will decide what ought to be done.—June 16th, 1869. (Signed) B. Peacock." This view of the learned Chief Justice was concurred in by the Judges of the Court as under: "I agree with the Chief Justice."—J. P. Norman. "And I."—C. Hobhouse.—G. Loch.—H. V. Bayley. "I agree."—D. N. Mitter. "Seen."—W. Markby.—E. Jackson. And further it was agreed to, as I have

(1) The letter then went into details to show the difficulty of obtaining a proper jury in the district to try the case, and suggested that the case should be transferred to the file of the High Court.

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already mentioned, by my learned colleague, Mr. Justice Louis Jackson.

This decision having been arrived at in 1869, it appears to us to set the matter at rest; and I think that Mr. Macrae, on the part of Government, will feel that he cannot with propriety contest the point further.

Mr. *Macrae* assented.

JACKSON, J.—I wish to add a few words by way of explanation of what seems to be an inconsistency on my part.

My acquiescence in the course taken on that occasion was in this degree marked, that while the other Judges had merely attached their initials in token of their concurrence, I wrote a separate note, and that note is in these words: "I quite agree with the Chief Justice that such an application could only be entertained, if made in the way stated by him. I take the opportunity of pointing out that it has been a very common practice for Sessions Judges to make recommendations for the transfer of cases from one district to another by letter, and that cases have often been so removed by a mere letter based on such recommendations. It may be worth considering whether some rule ought not be laid down for dealing with such applications. The same thing also happens in respect of civil cases."

It would seem, therefore, that I not only concurred in that view, but considered it desirable that the Court should lay down a formal rule, which should regulate the procedure in such cases, and should be a notice and a guidance to Judges and Magistrates when they should think fit to make such references in future. Immediately afterwards I left the country and was absent for four or five months, during which time no one took any steps in the matter. The result was that no formal rule was made, and this case appears to have passed out of sight. Two years afterwards I had the honor to succeed to the charge of the English Department, and found that, notwithstanding this case, the practice continued to be such as it had formerly been, and therefore the course I took in this case was

in strict conformity to the old practice which had not been departed from, notwithstanding this case.

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I do not hesitate to say that the procedure suggested by Sir B. Peacock is the proper one when there are parties concerned ; but the practice being such as I have stated, I consider myself justified in making the order which I did.

GARTH, C.J.—I desire to add that I personally do not regret that this matter has been thoroughly ventilated and discussed in open Court. It is extremely desirable that the public should fully understand that in this country there is the same law for the Government as for the subject ; and that there is not one course of practice for the Crown, and another for the prisoner. Wherever the rights of the subject are concerned, it is quite right that the matter should be dealt with by us in open Court in our judicial capacity, and that each application should be made, supported by affidavit or affirmation, in the regular way.

In the present case the rule will be made absolute to set aside the order complained of, and the Crown will be at liberty, if so advised, to make a substantive application to the Court for the transfer of the case to some other district.

MACPHERSON, J.—I concur in thinking that the Crown has shown no good cause against the rule ; and that the rule should be made absolute.

PONTIFEX, J.—I also agree.

MORRIS, J.—I also agree.

Rule absolute.

PRIVY COUNCIL.

P. C.*
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Dec. 15, § 16
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PHOOLBAS KOONWUR (PLAINTIFF) v. LALLA JOGESHUR SAHOY
AND OTHERS (DEFENDANTS).

[On Appeal from the High Court of Judicature at Fort William in Bengal.]

Hindu Law—Mitakshara—Undivided Share of Joint Family Property—Succession—Decree in Suit against Widow—Limitation—Act VIII of 1859, s. 246—Disability under ss. 11 and 12, Act XIV of 1859—Misjoinder—Questions of Law referred to a Full Bench.

The limitation of one year, provided by s. 246 of Act VIII of 1859, is subject, in the case of a minor, to be modified by ss. 11 and 12 of Act XIV of 1859.

Muhomed Bahadur Khan v. The Collector of Bareilly (1) distinguished, on the ground that it was decided on an Act of a very special nature.

The benefit of ss. 11 and 12 of Act XIV of 1859 is not limited to the period when the disability of minority has ceased, but applies also to the period during which the disability continues; and therefore, during the latter period, it is open to the minor to sue by his guardian.

On the death without issue of a member of a Hindu family joint in estate and subject to the Mitakshara law, his undivided share in the joint family property passes to the surviving members of the joint family and not to his widows, and cannot be made liable for his debts under decrees obtained against his widows as his representatives.

Quære, where a member of a joint Hindu family governed by the Mitakshara law, without the consent of his co-sharers, and in order to raise money on his own account, and not for the benefit of the joint family, mortgages in his lifetime his undivided share in a portion of the joint family property, can the other members of the joint family, on his death, recover from the mortgagee the mortgaged share, or any portion of it, without redeeming?

A suit by a surviving member of a joint Hindu family subject to the Mitakshara law, to recover a moiety of the undivided share of a deceased member of the family in the joint family property, ought not to be dismissed on the ground that all the members of the family have not joined in bringing the suit, where it appears that the only other surviving member of the family has already sued for and recovered his moiety of the property, and disclaims all further interest, and is joined as a co-defendant in the suit.

* *Present*:—SIR J. W. COLVILLE, SIR M. E. SMITH, AND SIR J. BYLES.

Where a Division Bench of a High Court refers a question of law for the consideration of the Full Bench, and the answer of the Full Bench is not framed as a decree or as an interlocutory order, and an appeal is brought to Her Majesty in Council, it is open to the respondent, without a cross-appeal, to object to the correctness of the answer given by the Full Bench on the question of law referred.

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APPEAL from eleven decrees of a Division Bench of the Calcutta High Court (Kemp and Markby, JJ.), dated the 18th November 1870, whereby decrees of the Principal Sudder Ameen of Sarun, dated the 27th March and the 9th April 1866, were reversed or modified.

The facts of the case were the following:—Dukhin, Sheogobind, Kasheenath and Mukkun, the four sons of Bhunjun Sahoo, were, with their cousin Ajoodhya Pershad, members of a joint Hindu family holding joint family property subject to the Mitakshara law. Under an arrangement into which they entered, all the property which had been acquired by the family in the name of any of its members before the year 1846 was to remain joint family property, but all subsequent acquisitions were to be regarded as separately acquired. Ajoodhya Pershad and Mukkun Sahoo died without issue, the former leaving a widow. Sheogobind died leaving a son Bhugwan Lall, who died in the year 1860, without issue, but leaving two widows. At the time of Bhugwan Lall's death the only male members of the joint family then surviving were Sudaburt Pershad the son of Dukhin, and Hureenath Pershad, the son of Kasheenath. In the year 1861, Sudaburt Pershad instituted a suit in the Zilla Court of Sarun against the widow of Ajoodhya Pershad, the widows of Bhugwan, and other defendants, in which he claimed a moiety of the joint family property, admitting that the remaining moiety belonged to his cousin Hureenath, who with his mother Phoolbas Koonwur was joined as a co-defendant in the suit. In that suit Sudaburt sought to set aside certain conveyances of the joint family property which had been executed by Mukkun and Bhugwan Lall and by the widows of the latter. The suit was contested, but no objection was taken to its form as having been brought by one member of a joint family. The principal issue raised

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was whether the family generally was joint or separate in estate. The judge decided that in accordance with the arrangement above referred to the family was joint in respect of all property acquired prior to 1846, and separate as to property acquired since that time. With reference to alienations of the joint property under deeds executed by Mukkun and Bhugwan Lall the Judge held that these were valid, but that alienations by the widows of Bhugwan were void, and he gave Sadaburt a decree for a moiety of the family property as it had stood prior to the year 1846, excluding such portions as had been sold by Bhugwan Lall or any of the other co-sharers, or had been sold on account of their debts. A list of the lands in respect of which Sadaburt was declared entitled to a moiety, and another list of lands purchased after 1846, in respect of which he was declared to have no title, were annexed to the judgment. The decision of the Judge was affirmed by the High Court on appeal on the 10th March 1863 (1). Subsequently to the date of the final decision in Sadaburt's suit, various persons who had obtained decrees against the widows of Bhugwan Lall as his representatives, attached and sold the remaining moiety of the joint property in execution of their decrees. In addition to the claims set up by the auction-purchasers under these sales, certain other persons alleged rights in respect of the properties in question under usufructuary mortgages from Mukkun and Bhugwan and under conveyances from the widows of the latter.

On the 10th April 1865, the present suit was instituted in the Court of the Principal Sudder Ameen of Sarun by the appellant Phoolbas Koonwur as mother and guardian of the minor Hureenath Pershad, against the widows of Bhugwan and the various persons claiming the property as auction-purchasers, or otherwise. Sadaburt Pershad and the widow of Ajoodhya Pershad were joined as co-defendants in the suit. In her plaint, the plaintiff relied on the decision in Sadaburt's suit as establishing against the widows Hureenath's right to the remaining moiety of the lands which had been declared to be

(1) The judgment of the High Court in Sadaburt's suit is reported in 2 Hay, p. 315.

joint family property. The defence taken by the widows does not appear on the record. Sudaburt filed a written statement, in which he admitted the plaintiff's title and disclaimed any interest in the litigation, having already recovered in his own suit the moiety of the family property to which he was entitled. The statements filed by the defendants, the auction-purchasers, were to the effect that Kasheenath, the father of Hureenath, had separated in estate from the other members of the family more than twelve years before the institution of this suit, which was consequently barred by limitation; that the lands which they had purchased were the separate property of Bhugwan, and had properly been made liable for his debts in suits against his widows; that on the lands being seized in execution of the decrees in these suits, the plaintiff had applied for their release, and that the present suit not having been brought within one year from the date when that application was rejected was out of time under the provisions of s. 246, Act VIII of 1859. Other pleas of limitation were also taken under cls. 3, 5 and 7 of s. 1, Act XIV of 1859, and under s. 257, Act VIII of 1859. Those of the defendants who claimed to hold under mortgages from Mukkun and Bhugwan Lall contended that the suit could not be brought till the mortgage debts had been paid off. The defendants who claimed under conveyances from the widows alleged that the latter had sold in order to discharge Bhugwan's just debts.

The general effect of the Principal Sudder Ameen's decision in the suit was to overrule the various defences set up and to find that the property in suit was joint family property to which the plaintiff had established her son's right. But in respect of particular portions of the lands claimed, for reasons expressed in his judgment, he disallowed a part of the plaintiff's demand.

From this part of his decision an appeal, No. 170 of 1866, was presented to the High Court on behalf of the plaintiff, and numerous appeals were at the same time preferred on behalf of the defendants. Of these, the appeals Nos. 224, 234, 235, 237, 238, 239, 240, 243, 244 and 245 are brought under consideration in the present appeal.

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The Division Bench of the High Court, before which the appeals came, conceiving that they involve points of law on which the authorities were conflicting, referred the following questions for the consideration of a Full Bench :—

1. Bhugwan Lall, a member of a Hindu family living under the Mitakshara law, and having joint family property, died entitled to an undivided share in such property, and leaving two widows, him surviving. After the death of Bhugwan Lall, his widows were sued in their representative capacity in respect of debts incurred by him in his lifetime on his own account, and not for the benefit of the joint family, and decrees were obtained against the widows in that capacity. In execution of one or more of these decrees, an interest in certain portions of the joint family property, to the extent of the share to which Bhugwan Lall was entitled in his lifetime, has been sold by auction, and the purchasers have taken possession. Can the nephew of Bhugwan Lall, who is one of the surviving members of the joint family, recover from the purchasers possession of the interests which they have purchased, or any part of them?

2. Bhugwan Lall, in his lifetime, executed an ordinary zuripeshgi mortgage in respect of his undivided share in a portion of the joint family property, in order to raise money on his own account, and not for the benefit of the family. Can the nephew of Bhugwan Lall recover from the mortgagee, without redeeming the same, possession of the mortgaged share, or any portion of it?

The first of these questions the Full Bench unanimously answered in the affirmative. The result of their opinions is thus expressed by the Chief Justice, Sir Barnes Peacock, at the close of his judgment :—" I think, therefore, that this property, not being the property of the widows, and not being the property of the heirs of the deceased, could not be made available under the decree against the widows; that if it could be made available at all for payment of the debts of the deceased, it must be in a suit against the survivors to charge the share of the deceased in the joint estate with the payment of the decree, by suing the survivors for the debt, and asking to have the deceased's share of the estate made available in the hands of

the survivors to the same extent as that to which it would have been made available if the deceased had left a son and the estate had gone to him by inheritance, instead of to the survivors by survivorship. I think then, that the question must be answered in the affirmative; that the plaintiff has a right to sue the purchaser under the decree to recover back the estate, inasmuch as the property belongs to him, and the title of the purchaser under the decree against the widows is an invalid title."

Upon the second and more difficult question the Chief Justice, after reviewing the authorities, came to the conclusion that according to the law of the Mitakshara, as settled by authority in the Presidency of Bengal, Bhugwan Lall had no authority, without the consent of his co-sharers, to mortgage his undivided share in the joint family property in order to raise money on his own account, and not for the benefit of the family. He further observed that the facts were not sufficiently stated to enable the full Bench to say whether the nephew of Bhugwan Lall could recover from the mortgagee, without redeeming the same, possession of the mortgaged share, or any portion of it. The other members of the Full Bench concurred in this opinion.

The appeals, the parties not consenting to have them decided by the Full Bench, went back to the Division Bench, and were thus dealt with. Markby, J., after going through the facts in each case, held that Nos. 170, 224, 235, 238, 239, 240, 243, 244 and 245 were wholly governed by the answer of the Full Bench to the first question, inasmuch as in each the title of the defendant depended entirely on the validity of his purchase at a sale had in execution of a decree against the widows, and was consequently defective.

In No. 243 it was alleged by the then appellant that the property claimed, Mouza Telpakhoord, was subject to a zuripeshgi lease, executed by Mukhun Sahoo, a member of the joint family who predeceased Bhugwan Lall. Markby, J., however found that the title of the appellant did not depend on this alleged zuripeshgi, from which he had been ousted, but on a purchase at a sale in execution of the decree which he had

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obtained against the widows; and consequently that this case was not distinguishable from No. 170.

In No. 234, however, the property in question was clearly subject to a subsisting zuripeshgi lease created by Bhugwan Lall; and in this case, therefore, there arose the further question, whether the plaintiff could recover this parcel of land without redeeming the mortgage on it, and the learned Judge, accepting, apparently against his own judgment, the principle affirmed by the answer of the Full Bench to the second question, held that it would entitle him to do so. Markby, J., however, proceeded to lay down a principle which governed all the cases, and which he held justified the dismissal of the plaintiff's suit.

The grounds on which he so held are stated as follows in the judgment of Markby, J.:—

“The defendants have failed to prove their titles, and as the properties claimed are all portions of the joint family property, and the plaintiff's title to a four-anna share in the family property is not disputed, the plaintiff claims a decree for possession to that extent. But it seems to me that the answer given by the Full Bench to the second of the two questions which we propounded precludes us from giving any such decree. As I have said, whether or no I concur in the principles laid down by those answers, I feel bound to apply them to the cases before us, and so doing, it seems to me impossible to give the plaintiff the decree which he claims, which is a separate decree for possession for his four-anna share. I do not see how it is possible if that decision be correct that such a decree should be executed. And I think that if the Full Bench decision be right, to attempt to execute it would be to do the very thing which the Full Bench say cannot be done, namely to create a separation otherwise than by a partition. Had Hureenath been of age when this suit was brought, the fact that his brother had been joined in it and had assented to the claim might have been taken as creating a partition by consent. I do not say this would be so; even that might hardly be consistent with the Full Bench decision, but it is unnecessary to consider it, because Hureenath being a minor, no such arrangement can be inferred. There has been no enquiry whether a partition would be for the benefit of the minor, nor indeed was it ever suggested until the last moment that such an inference was possible. The truth

appears to me to be that this suit has been brought just as Sudaburt's suit was brought under the notion that a member of the Mitakshara family, like a member of a Bengal family, may act to a certain extent independently in reference to his share. Whether or no such a notion is correct, I think at any rate, it has been not uncommon to bring such suits as the present one, that is to say, for one member to sue separately for his share; but this is obviously inconsistent with the very strict principles laid down by the Full Bench.

"I arrived at this conclusion upon an independent consideration of the answer of the Full Bench to the second question: and I am confirmed in thinking that I have rightly applied that decision by the case of *Rajaram Tewari v. Luchman Prasad* (1), decided very shortly after it. There, Peacock, C.J. (who also delivered the judgment in the Full Bench case) says, 'the plaintiffs as two only of the members of a joint family which does not appear to have been separated, and as two only of the owners of the joint property which does not appear to have been partitioned, are not entitled to any definite share for which they can sue alone: see *Appovier v. Rama Subha Aiyar* (2). The right of action has been misconceived, and the proper persons have not been made parties. The suit should have been brought by all the joint owners to set aside the deed as to the charge created by Oodit as well as to the charge created by Jetun, and the suit should have been brought by all the members of the joint family and not by two of them alone who before partition have no definite share. If the deed were to be set aside it would be impossible by the decree to define the share which the plaintiffs are entitled to recover.' I cannot distinguish this from the present case. The plaintiff here also sues separately to recover possession of his share, and it seems to me just as impossible to define the plaintiff's share in this case as it was in that. As I have said before it again comes to this. It would only be possible to execute the decree which is asked for either by treating this suit as constituting a partition or by treating the plaintiff as having at least some independent rights over his share; but, according to the Full Bench decision, there not having been a partition according to one of the modes known to the law, this cannot be done. It seems to me therefore that, applying consistently the decision of the Full Bench, the plaintiff cannot have the decree which he asks for."

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(1) 4 B. L. R., A. C., 118, see pp. 130, 131.

(2) 11 Moore's I. A., 75.

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Markby, J., further held that in appeals Nos. 238, 240 and 245, the plaintiff's claim was barred by limitation. In dealing with the first of these three appeals, in all of which the facts were similar, he said :—

"The property to which this appeal relates was sold in execution of a decree obtained by one Nundlall Bhuggut whilst the property was under attachment; and before sale the plaintiff, through his present guardian, filed a claim under s. 246, and that claim was rejected on the 6th April 1864. This suit was not commenced until more than a year had elapsed from that date, and it is contended that it is consequently barred by the concluding words of s. 246. It seems to have been finally adopted as the view of this Court that a person who considers his property has been wrongly seized and sold in execution, has the choice whether he will make a claim under s. 246, or not. If he makes no claim, he can bring his suit to recover the property at any time subject to the general law of limitation; but if he does make a claim and his claim is heard and rejected, then he must bring what is called his regular suit to establish his title within the year. In other words, by making the claim under s. 246, he lays himself open to the special law of limitation. This view of the law was not contested by the pleader for the plaintiff, respondent, but he relies on the fact that the plaintiff, when the claim under s. 246 was filed, was, and still is, a minor. He therefore claims the benefit of ss. 11 and 12 of Act XIV of 1859, and contends that, by the operation of those sections, the minor will have one year after he comes of age, to bring his suit under s. 246; and he argues that if he may bring the suit after he comes of age, *a fortiori* he may bring the suit before he comes of age, and, therefore, that he is not barred. This argument involves several contested propositions :—*First*, that ss. 11 and 12 of Act XIV of 1859 apply to s. 246 of Act VIII of 1859; *secondly*, that the appellant is under disability within the meaning of those sections; *thirdly*, that the benefit of those sections applies as well to the period during which the disability continues as to the period when the disability has ceased.

"With regard to the first proposition, it is to be observed that the terms of s. 11 and 12 of Act XIV of 1859 are general, and the change of expression in ss. 13 and 14, where somewhat similar provisions are expressly confined to the periods of limitation prescribed by the Act itself, is remarkable. On the other hand, as pointed out, s. 3 provides "that when by any law now or hereafter in force

a shorter period of limitation than that prescribed by this Act is especially prescribed for the institution of a particular suit, such shorter limitation shall be applied notwithstanding this Act." Now, the words "notwithstanding this Act" might be considered to indicate the intention of the Legislature to exclude any effect of this Act whatever in relaxing any special period of limitation elsewhere provided. But they might also be meant only to preserve such special rules of limitation from being by implication altogether repealed, while all rules of limitation, both those under the Act and those existing under any other Statutes were to be subject to such general relaxations as are contained in ss. 11 and 12, or in ss. 9 and 10, for these sections do not, when properly viewed, give an extended period of limitation, but rather modify the operation of the ordinary rules of limitation.

"On the whole, I think that, looking to the general words of ss. 11 and 12, the intention was to lay down for all cases a rule of greater precision with regard to disability than that which is stated by s. 14 of Reg. III of 1793. It can hardly be contended that this part of the old Regulation is now in force; and if not, this can only be because the provisions of ss. 11 and 12 of Act XIV of 1859 have been substituted for it. But if so, the argument that these sections are confined in their operation to Act XIV itself falls to the ground, and the provisions must be held to be perfectly general. So far, therefore, I think the plaintiff's contention is good, and that the rules contained in Act XIV, as to disability, are of general application and are not confined to the period of limitation provided for by that Act.

"The next question is whether the plaintiff was under disability within the meaning of s. 11. It is said that he was not, because he had a guardian who might have brought the suit. Here again I think it is desirable to compare the language of the section with that of the previous Regulation. Under the Regulation, by the section already referred to the plaintiff, in order to avoid the application of the rule, would have to show that "either from minority, or other good and sufficient cause, he had been precluded from obtaining redress." Under Act XIV, a minor would certainly not have to show anything of the kind, but he would be presumably entitled to the benefit of these sections. And the words of s. 12 are such as would seem to make the presumption conclusive, and to preclude all enquiry as to whether, under the particular circumstances of each case, the infant was, in fact, disabled. It can hardly be supposed that the Legislature did not advert to the fact that an infant may take proceedings through

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his guardian, and, if it had adverted to that fact, it would surely not have stated the disability of the infant in such absolute terms and yet have intended that this disability was to be after all only a modified one. Of course, also the Legislature must have had before it the terms of s. 14 of the Regulation of 1793, which seems to have been framed expressly to meet such cases as the present, and to give to the minor the benefit of a modified disability only. The change of expression seems almost expressly to show that under the new law the disability was to be considered absolute. On this point also, therefore, I think the plaintiff's contention is right.

"But I think his argument fails on the last point. I think that on one point at any rate, the words of s. 11 are clear and express, namely that whatever benefit the minor is to have is to accrue to him not during the disability, but when the disability ceases. Indeed, making the sweeping presumption which I think the Legislature has done as to the disability of infants, it could not consistently entertain the notion that any advantage could be taken of its provisions by a minor during his minority. In fact, the Legislature has thought fit to lay out of consideration altogether the possibility of an infant bringing a suit by his guardian, which the framers of the old Regulation had contemplated. If any consideration arising out of guardianship were to be imported into the construction of these sections, I fear we should introduce the greatest confusion. Nor does it seem to me that the introduction of such considerations would be decisive in favour of the plaintiff. If we modify the words of s. 11, we must modify the words of s. 12 also, and the question whether a minor who has had a guardian appointed is to be considered under disability will present itself in a very different shape. But I think that reading the words of the Act in their ordinary and natural meaning, the plaintiff is under disability, but can derive no advantage from that disability until he comes of age. . . . The result is, that as against the defendants who are parties to this appeal, the plaintiff's suit, in whatever way it is disposed of on the other point, ought to be dismissed with costs in both Courts on the ground that it was not brought within the year prescribed by s. 246. Whether or no, the plaintiff will be in a better position on his coming of age does not now arise, and I express no opinion on it."

Kemp, J., thought it unnecessary to express any opinion on the question of limitation discussed by Markby, J., but agreed that the plaintiff's claim must be rejected in all the appeals

on the ground that as there had been no partition of the joint family in respect of the property sought to be recovered, the plaintiff could not sue alone for a separate share.

Decrees were accordingly made in favor of the defendants in all the cases, and from those decrees the plaintiff brought the present appeal to Her Majesty in Council. The respondents not appearing, the case was heard *ex parte*.

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Mr. Cowie, Q.C., and Mr. J. D. Bell, for the appellant.—The view of the Division Bench that the plaintiff could not maintain this suit alone, is not warranted by the answer of the Full Bench to the questions referred for their consideration, and is erroneous. Sudaburt Pershad, the only other person interested as a joint member of the family, has already in a separate suit obtained possession of a half share of the joint property. The result of Sudaburt's suit has been to effect a severance. In that suit it might have been a good answer that there had been no partition, and that there was another member of the joint family who ought to be joined as a plaintiff. But when that suit was decreed, and Sudaburt recovered his half share, there was in fact a partition. See *Mussamut Anundee Koonwar v. Khedoo Lull* (1). Had Sudaburt been joined as a plaintiff in the present suit, it would have been objected that he had already sued, and had his rights awarded. He has no interest, and disclaims all interest in the present suit, but he has in fact been made a party to it in the only way the plaintiff could make him a party, that is, as a defendant. [SIR J. COLVILLE.—I see that in the judgment cited by Markby, J., there is a passage which he has not noticed, in which it is said that "if the other members of the joint family refused to join as plaintiffs, they might have been made defendants in the suit" (2).] That is the view which we contend is right, and on which we have acted.

As regards the point of limitation on which appeals Nos. 238, 240 and 245 have been declared to be barred, we submit, that the rules in ss. 11 and 12, Act XIV of 1859, which give an extension of the time for suing in cases of disability, will apply to and modify the provisions of s. 246, Act VIII

(1) 14 Moore's I. A., 412.

(2) See 4 B. L. R., A. C., 131.

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of 1859. The judgment of the Privy Council in the case of *Mohummud Bahadoor Khan v. The Collector of Bareilly* (1), in which it was held that the provisions of Act XIV could not be imported into Act IX of 1859, relating to forfeiture for rebellion, rested on the special character of that Act as a criminal law of a highly exceptional nature. [SIR M. SMITH.—Even if we had applied the provisions of Act XIV in the case you refer to, the suit would not have been in time.] It is not to be inferred from that judgment that the provisions of Act XIV, which is a law of general application regulating civil procedure, shall not be applicable to another general law *in pari materia*. The Calcutta High Court has so applied them in the case of *Huro Soonduree Chowdhraïn v. Anundnath Roy Chowdhry* (2). The view taken by Markby, J., that the minor is not to have the benefit of his disability till it is ended, is not in accordance with other decisions of the Calcutta High Court. See *Ram Chunder Roy v. Umbica Dossee* (3), *Ram Ghose v. Greedhur Ghose* (4), and *Suffuroonnissa Beebee v. Noorut Hossein* (5).

In appeal No. 234, the second question referred to the Full Bench of the High Court is raised. The Division Bench has held that the answer returned by the Full Bench negatives the defendant's title. Since there has been no cross-appeal on behalf of the defendants from the answer given by the Full Bench that answer must, for the purposes of the suit, be regarded as final.

In case No. 237 as there seems room to doubt whether the property claimed was in fact a part of the joint family property, we withdraw our appeal.

Their LORDSHIPS took time to consider their judgment, which was delivered by

SIR J. W. COLVILLE.—The suit out of which this appeal has arisen concerns a moiety of the undivided share of one

(1) L. R., 1 Ind. Ap., 167; see at	(3) 7 W. R., 161.
p. 176; S. C., 13 B. L. R., 392.	(4) 14 W. R., 429.
(2) 3 W. R., 8.	(5) 17 W. R., 419.

Bhugwan Lall Sahoo, in certain immoveable property situate in Zilla Sarun. Bhugwan Lall Sahoo, who died in 1860, was a member of a Hindu family, which was descended from a common ancestor named Deepa Sahoo, and which was governed by the law of the Mitakshara, the general law of the province in which it was domiciled. He died childless, but left two widows, Moheshee and Parbuttee. They therefore would have been his general heirs had he been wholly separate in estate; and were in any case entitled to such part of his succession as had been acquired, or was held by him as separate estate. On the other hand, if the status of the family continued at the time of his death to be that of a joint and undivided Hindu family, his interest in the joint family property survived to his male coparceners. The only persons who answered that description were Sudaburt Pershad and the plaintiff Hurreenath Pershad. They, in some of the proceedings, are called his nephews, but according to the pedigree set out in the appellant's case, and apparently proved in the cause, they were his first cousins the sons of two different uncles.

It must now be taken to have been conclusively determined that Bhugwan, at the time of his death, though entitled to certain subsequent acquisitions as separate estate, was, as to all the properties acquired by the family in the name of any of its members before the year 1846, joint in estate with Sudaburt and Hurreenath, and accordingly that his share in those properties became vested by survivorship in them. This question was first litigated in a suit brought by Sudaburt in 1861. The principal defendants to that suit were the widows. The judgment of the Zilla Judge, confirmed on appeal by the High Court on the 10th of March 1863 (1), made the distinction above stated between the properties acquired before, and those acquired subsequently to, 1846, affirming the title of the surviving male members of the joint family to the former. It unfortunately, however, happened that owing either to the frame of this suit, or to the manner in which the decree made in it was executed, the result of this earlier litigation was only to put Sudaburt into

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possession of one moiety of Bhugwan's share in the joint family property.

Subsequently the remaining half-share of Bhugwan in portions of the joint family property appears to have been seized and sold in execution of various decrees obtained against his widows as his representatives. And on the 10th of April 1865, the present suit was instituted by the mother and guardian of Hurreenath in order to recover possession, and to have his name entered as proprietor, of his moiety of Bhugwan's share in the joint properties, and to cancel and set aside the execution sales under the decrees against the widows. The defendants to that suit were the widows, the different purchasers under the execution sales, and, under the description of "Precautionary defendants," the widow of another deceased member of the joint family, as to whom there is now no question, and Sudaburt Pershad, the plaintiff in the former suit. As such defendant Sudaburt filed a written statement, in which he disclaimed all interest in the suit, on the ground that under the decree in his own suit he had been put in possession of his share in the property in dispute. The cause was tried between the plaintiff and the other defendants, and a decree was made by the Principal Sudder Ameen on the 9th of April 1863, which, in so far as it related to the particular properties which are the subject of the present appeal, was in favour of the plaintiff. Against this decree the parties defendants, who were affected by it, appealed to the High Court. Their appeals were necessarily separate, inasmuch as the suit was so framed as to embrace interests, not only dependent on different titles, but confined to particular portions of the property in dispute. The High Court decided many of these appeals in favour of the defendants, upon grounds of which some will be afterwards considered. This appeal to Her Majesty in Council originally embraced only eleven of the separate decrees so made. And of these Mr. Cowie has given up one—*viz.*, No. 237. Accordingly their Lordships have now only to deal with the questions involved in the ten appeals, numbered respectively 170, 224, 235, 239, 244, 234, 243, 238, 240, and 245.

The course of proceeding in the High Court with respect to

these appeals was as follows. (After detailing the course of proceedings in the High Court, and the decision in the various cases as set out, *ante*, pp. 230 & 231, his Lordship proceeded :—

Their Lordships propose in the first instance to consider whether the appeals Nos. 238, 240, and 245 have been rightly disposed of on the ground of limitation. The facts proved are, that in each of these cases the plaintiff, through his guardian, preferred a claim to the property, when attached, under the 246th section of Act VIII of 1859; that that claim was rejected; and that the present suit was not brought within one year from the date of the order of rejection. This objection would have been fatal to the suit, had the party preferring the claim been an adult; and the only question to be determined was whether the plaintiff, being under the disability of infancy, could claim the benefit of the 11th section of Act XIV of 1859, which empowers him or his representative to bring a regular suit within the same time after the cesser of the disability as would otherwise have been allowed from the time when the cause of action accrued. This question, Markby, J., observed, involved several contested propositions, viz :—

1. That ss. 11 and 12 of Act XIV of 1859 apply to s. 246 of Act VIII of 1859.

2. That the plaintiff is under disability within the meaning of these sections.

3. That the benefit of these sections applies as well to the period during which the disability continues, as to the period when the disability has ceased.

Upon the two first propositions, his opinion was in favour of the plaintiff; upon the third he held that whatever benefit the minor was to have, was to accrue to him not during the disability, but when the disability might cease; and accordingly that the present suit being brought by him, whilst still a minor, through his guardian, must fail.

Upon the second of the propositions stated by Markby, J., their Lordships cannot see how, in face of the plain language of the 12th section, there can be any room for doubt.

Upon the first they also agree with the learned Judge that

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ss. 11 and 12 of Act XIV of 1859 do apply to the 246th section of the Act VIII of 1859.

The two Statutes were passed in the same year, the assent of the Governor-General being given to Act VIII on the 22nd of March, to Act XIV on the 4th of May 1859. The object of the first was to enact a general Code of Procedure for the Courts of Civil Judicature not established by Royal Charter. The object of the second was to establish a general Law of Limitation in supersession both of the Regulations which had governed those Courts and of the English Statutes which had regulated the practice of the Courts established by Royal Charter. Looking to the fifth sub-section of the first section, and the 3rd and 11th sections of Act XIV of 1859, their Lordships have no doubt that the intention of the Legislature was that the period of limitation resulting from the 246th section of Act VIII should, in the case of a minor, be modified by the operation of the 11th section of Act XIV; and that this construction has obtained in the Courts of India appears from the case of *Huro Soonduree Chowdhraïn v. Anundnath Roy Chowdhry* (1).

In coming to this conclusion, their Lordships have not failed to consider the recent decision of this Board in the case of *Mahomed Bahadur Khan v. The Collector of Bareilly* (2). That case, however, they think, is distinguishable from the present. It arose upon a very special statute, and upon that ground the judgment rests. Their Lordships there said: "It was argued that the clauses in the general statute, Act XIV, 1859, relating to disabilities, might be imported into this Act, but this cannot properly be done. Act XIV is a Code of Limitation of general application. This Act is of a special kind, and does not admit of those enactments being annexed to it. And they proceeded to observe that the application of the Statute (if it did apply) would not assist the appellants, who would not even in that case have brought their suit in proper time.

This being so, the only other point to be considered on this

(1) 3 W. R., 8.

(2) 13 B. L. R., 292; S. C., L. R., 1 Ind. Ap., 167.

question of limitation is whether the learned Judge was right in holding that an infant cannot after the expiration of the year bring a suit by his guardian whilst the disability of infancy continues. Their Lordships cannot agree in this construction, which, it would appear from the cases cited by Mr. Bell—(*Ramchunder Roy v. Umbica Dossee* (1), *Ram Ghose v. Greedhur Ghose* (2), and *Suffuroonissa Bibee v. Noorul Hossein* (3)—has not been accepted or followed by the Courts in India. It is unreasonable in itself, since it implies that the infant's claim, which is admittedly not barred, was asserted too soon rather than too late; and it cannot be the policy of the law to postpone the trial of claims. Again, to render such a construction imperative, the phraseology of the 11th section must be altered by making the words "after the disability shall have ceased" precede, instead of follow, as they do, the words "within the same time." Their Lordships are therefore of opinion that the plaintiff's suit is not open to the objection that, in so far as it concerns the properties in question in Nos. 238, 240, and 245, it has not been brought within the proper time.

The next point to be considered is whether the High Court was right in allowing all the ten appeals, and in dismissing the plaintiff's suit as to those portions of the joint family estate which were the subject of them, on the ground that the suit was wrongly framed.

It is to be observed that the objection taken by the Division Bench to the frame of the suit, assumes the correctness of the answer given by the Full Bench to the second of the questions referred to it, and is in the nature of a corollary from the proposition therein affirmed. The learned Judges of the Division Bench argue that if it be true that a member of a joint and undivided Hindu family cannot alienate his undivided share in the joint family property without the consent of his co-sharers, it follows that he cannot alone sue for his separate share. And they rely upon a decision in the case of *Rajaram Tewaree v. Luchmun Pershad* (4), in which it was ruled that two only of the members of a joint and undivided family could

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(1) 7 W. R., 161.

(2) 14 W. R., 429.

(3) 17 W. R., 419.

(4) 4 B. L. R., A. C., 118.

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not sue to set aside a charge created by one member of the family, and to recover their particular shares in the property charged, but that the suit must be brought by or on behalf of all the members of the joint family. Their Lordships do not mean in any way to impugn the authority of that case, or to dispute the general principle affirmed by it. They do not, however, think that the principle is applicable to the peculiar circumstances of, or ought to govern, the present case.

In this case Sudaburt, the only other member of this joint family, has, under the practice which was then allowed to prevail in the Courts of India, succeeded in recovering, and has been put into possession, of his share of the joint family property. He cannot be said to have any beneficial interest in respect of which he could now sue as plaintiff; and supposing him to have an interest, the present plaintiff has made him a party to this suit in the only way in which a person who is unwilling or unable to be joined as plaintiff can be brought before the Court, *i.e.*, by joining him as a defendant. In that character Sudaburt has disclaimed all interest in the subject-matter of the litigation, alleging that he has already been put into possession of all to which he is entitled. Again, in most, if not all, of the appeals the title of the substantial defendants is founded on execution sales confined to that moiety of Bhugwan's share which, on a partition, would now fall to the plaintiff. The objection to the frame of the suit was not taken by the substantial defendants; it seems to have originated with the Judges of the Appellate Court. It is one of form rather than substance; for it cannot be said that if it does not prevail, the defendants (Sudaburt being a party to this litigation and admitting that he is in possession of his share) can be harassed by any second suit. On the other hand, if the objection prevails, the defendants will remain in possession of property to which, after full trial, they have been found to have no title; and the plaintiff will be left to the chances of another suit, in which he may be met by objections well or ill founded on the lapse of time, or the effect of the decrees under appeal as *res judicata*. Their Lordships are of opinion that

they ought not to allow the objection to prevail against the substantial justice of the case.

What has been said is sufficient to determine this appeal in favour of the appellant, so far as it relates to the decrees of the High Court in the nine appeals numbered respectively 170, 224, 235, 239, 243, 244, 238, 240, and 245.

There is, however, as has been already stated, a further question as to the appeal numbered 234, and at the hearing it occurred to their Lordships, who have unfortunately to determine this appeal *ex parte*, that if the respondents had appeared, they might, without a cross-appeal, have contested the correctness of the answers given by the Full Bench to the questions referred to them—answers which are not in the form of a decree, or even of an interlocutory order. To the answer to the first question their Lordships think no objections could have been urged successfully. The second question, however, involves a point of Hindu law, upon which the authorities are not altogether consistent; nor are their Lordships satisfied that the principle laid down by the Full Bench would, if correct, govern this particular case, of which they will now proceed to examine the circumstances somewhat more in detail.

The property to which it relates is thus described in the schedule to the plaint. The village is specified as Tulmanpore Bhada in two kalums (items). The share of the joint family is stated to be one of ten annas and eight pie. Of this five annas and four pie are deducted as the share of Sudaburt Pershad, which reduces the share claimed by the plaintiff to five annas and four pie. The column of remarks contains the following statement: "This mouza was held in zuripeshgi lease under a zuripeshgi deed executed by Saligram Sahoy and Ramruchea Sahoy. It was sold at an auction on the 18th of November 1862, and purchased by the defendant Bikramajeet Lall for 3 rupees. The zuripeshgi and lease are fit to be cancelled."

Bikramjeet Lall and another defendant were the appellants in No. 238, which seems to have covered the whole of the five annas and four pie share of Tulmaupore Bhada with other portions of the property in dispute. From what

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has been stated above it follows that their title, resting as it does upon a purchase at a sale in execution of a decree against the widows, is defective; that the right of the plaintiff to impeach it is proved, and accordingly their appeal ought to have been dismissed. This, however, does not determine the rights of the plaintiff as against the zuripeshgidars. He may be entitled either to recover so much of the property as is covered by the zuripeshgi by setting aside the zuripeshgi lease, or merely to stand in the shoes of the nominal mortgagor. But the nature and extent of his right can only be determined in appeal No. 234.

The appellants on that appeal were the original zuripeshgidars, Saligram Sahoy and Ramruchea Sahoy. The zuripeshgi deed appears to have covered originally only 5 annas and 4 pie of the entire 16 annas of Mouza Tulmanpore Bhada. If then it be true that Sudaburt Pershad has succeeded in recovering one moiety of this, the subject of the dispute on this appeal is the remaining moiety or a 2-anna and 8-pie share. And this appears to have been the view of the High Court, for their decree on this appeal is limited to a 2-anna and 8-pie share. If, on the other hand, Sudaburt has not succeeded in his suit in setting aside the zuripeshgi as against him, or in otherwise wresting possession of his share from the zuripeshgidars, it follows that the question of the validity of this zuripeshgi remains to be determined between the latter on the one side, and him and the present plaintiff on the other.

The plaint in this suit alleged no special grounds for setting aside the zuripeshgi of the 9th December 1859, and indeed contained no special mention of it. The written statement of the defendants Saligram and Ramruchea set up that deed, and insisted on their rights under it. But none of the issues are specially pointed to the validity of the deed. Nor do the judgment or the decree of the Principal Sudder Ameen deal with that question. All that they decide with respect to the share claimed in Tulmanpore Bhada is that "plaintiff be put in possession thereof in the manner in which possession has been given by the decree of the 5th of April 1862" (to Sudaburt).

This reference to the suit of Sudaburt makes it material to consider whether there really was any adjudication upon this question in that suit. The suit, it will be remembered, involved the right of succession to the whole of the property of which Bhugwan Lall died possessed as between his widows and the surviving members of the joint family. The plaint in that suit contains no specific statement touching the zuripeshgi deed of the 9th of December 1859, unless it be in the schedule where in the columns of remarks it is said, "the deed to the extent of plaintiff's share ought to be amended." The judgment of the Zilla Judge put the share in Tulmanpore Bhada into the first parcel, which it found to be joint family property. So far it affirmed the title of Sudaburt and Hurreenath, and negatived the title of the widows, to whatever interest in it belonged to Bhugwan Lall at the time of his death. But in answer to the 11th issue it expressly found that the deeds executed by Mukkun, Bhugwan, or the other partners were valid. The decree was a general decree for possession over the properties in the first list. The High Court, on appeal, simply affirmed this judgment and decree of the Zilla Court. Can it be said that this judgment and decree import any adjudication touching the invalidity of the deed of the 9th of December 1859, as against the surviving members of the joint family, even if the plaintiff in this suit could claim the benefit of such an adjudication. The judgment, so far as it goes, is on the face of it the other way. The terms of the decree may import only that the plaintiff Sudaburt was, so far as his share was concerned, to be put into possession of the rights of Bhugwan. If in the execution of that decree, he has contrived, it may be wrongfully, to dispossess to the extent of his share the zuripeshgidars, that circumstance cannot give title to the plaintiff.

Again, what has been found by the High Court with respect to this appeal? The answer of the Full Bench expressly stated that the facts were not sufficiently stated to enable them to say whether the nephew of Bhugwan Lall could recover from the mortgagee, without redeeming the same, possession of the mortgaged share or any portion of it. That statement, taken in connection with the general principle

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affirmed by them, imports that there was no *constat* that the execution by Bhugwan of the deed was without the consent of his co-sharers, or not for the benefit of the family. Markby, J., does not consider this latter question, but simply says "As no objection was made to the reference to the Full Bench, I think we ought to accept its decision for the purposes of this case, and to hold that the appellants have failed to establish their title."

In these circumstances there appears to have been no real trial of the question between the plaintiff and the then appellants in No. 234; and therefore, assuming the principle enunciated by the Full Bench in its answer to the second question to be strictly correct, their Lordships do not feel themselves at liberty to reverse the decree in favour of the then appellants, and to make a decree in favour of the plaintiff. This being so, they abstain from pronouncing any opinion upon the grave question of Hindu law involved in the answer of the Full Bench to the second point referred to them, a question which, the appeal coming on *ex parte*, could not be fully or properly argued before them. That question must continue to stand, as it now stands, upon the authorities, unaffected by the judgment on this appeal.

Their Lordships have felt some doubt as to the form of the order which ought to be made on appeal No. 234. The plaintiff has failed to establish his title to recover the land against the zuripeshgidars. He might, however, have established such a title even in this suit, had a proper issue been framed and determined. On the other hand, he has established his title to the property, subject to the zuripeshgi. His rights may be prejudiced by the decree as it stands. The suit is an example of the inconvenience of embracing in one suit titles to various parcels of land, which, although having a common foundation, are different in many particulars, and are to be asserted against defendants having no common interest. Their Lordships have come to the conclusion, that the dismissal of the present suit against the appellants (in the High Court) in No. 234 ought to stand, but that the decree of the High Court on that appeal ought to be varied by adding a declaration, that it is to be without prejudice to the right of the plaintiff to

recover the lands in question on satisfaction of the zuripeshgi. This appeal, so far as it relates to No. 237 (the case given up by Mr. Cowie) must be dismissed, and the decree made by the High Court in that case affirmed. In the other nine cases, the decrees of the High Court must be reversed, and an order made, dismissing in each case the appeal to the High Court, with the costs of the appeal in that Court, and affirming the decree of the Principal Sudder Ameen as to the parcels of property which are the subjects of those appeals. The above will be the substance of the order which their Lordships will humbly recommend Her Majesty to make.

Their Lordships think that there should be no order as to the costs of this appeal.

Appeal dismissed in No. 237.

Decree varied in 234.

Appeal allowed in the other cases.

Agents for the appellant: Messrs. *Lawford and Waterhouse.*

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Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Pontifex.

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OTHERS (DEFENDANTS).

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5-30,
and
May 2.

Jurisdiction—Suit for land—Letters Patent, 1865, cl. 12—Deed of Trust giving Trustees Power of Sale of Land in the Mofussil—Suit by Creditor to have Trusts carried out.

M and *L* were the joint absolute owners of certain land in the mofussil, *M* having a 14-anna share, and *L* the remaining 2-anna share therein. During the absence of *L* in England, *M* executed, on behalf of himself and *L*, a deed of assignment of the whole of the property to trustees, for the benefit of the creditors of the estate, which was heavily encumbered, on trust to sell the land and distribute the assets to the creditors. The trustees accepted the trust, but difficulties afterwards arose in carrying them out. A suit was thereupon instituted by the plaintiff, a creditor, on behalf of himself and the other creditors, the plaint in which alleged that the trustees were desirous of being

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discharged, and prayed that the trusts might be carried into effect; that the trustees might be removed; and that a Receiver might be appointed to carry out the trusts. To this suit the trustees and *M* and *L* were made defendants. *L*, who was in England, denied any power in *M* to execute the deed on his behalf: the trustees and *M* were personally subject to the jurisdiction. *Held per PHEAR, J.*, in the Court below, that the plaint disclosed a good cause of action, as the Court, if it had jurisdiction, would have power to make a declaration binding against *L* as to the validity of the deed of trust, to appoint a Receiver of the estate, and to direct a sale which would be binding on *M* and *L*; but that the suit being one "for land" within the meaning of clause 12 of the Letters Patent the Court had no jurisdiction to try it.

Held on appeal that the suit, having for its object to compel a sale of the whole of the land, including *L's* share the title to which was disputed, was a "suit for land" within the meaning of cl. 12 of the Letters Patent, and that the Court had no jurisdiction to try it.

APPEAL from a decision of Phear, J., dated 2nd February 1876.

The suit was brought to carry out the trusts of a certain deed which had been executed for the benefit of the creditors of W. E. Morrell and H. N. Lightfoot, and which related to certain immoveable property situated outside the local limits of the jurisdiction of the High Court. The plaintiff Bank represented the creditors interested in the deed, and the original defendants were T. H. Wordie and T. Longmuir, the trustees, who were both resident in Calcutta.

The plaint stated that Morrell and Lightfoot were co-partners in the property to which the trust deed related, the former, having a 14-anna share, and the latter a 2-anna share in the property; that the property was, prior to the execution of the trust deed, heavily encumbered, the plaintiff Bank being creditors of Morrell and Lightfoot and mortgagees of certain portions of the property; that on the 14th of May 1875, Morrell on his own behalf, and as attorney for Lightfoot who was then absent in England, executed a deed, by which all their property, subject to the encumbrances, was assigned to the defendants upon certain trusts, among which was one to the effect that the trustees should call in and collect such part of the estate as consisted of money, and sell and convert into money the landed property, and should, out of the assets, so far

as they were sufficient for the purpose, discharge the liabilities of the debtors; that the defendants accepted the trusts of the deed and appointed Morrell to manage the property; but subsequently, by reason of certain complications which arose in carrying out the trusts, the defendants became desirous that they should be relieved from carrying them out, and that a Receiver should be appointed to collect and distribute the assets. The plaint prayed that the trusts of the deed might be carried into effect, that the defendants might be removed and relieved from further carrying out the trusts, and that a Receiver might be appointed to carry out the trusts of the deed.

The defendants Wordie and Longmuir filed a written statement, in which they stated that they were desirous of relinquishing the trusts, but were willing to carry them out under the direction of the Court. On the case coming on for settlement of issues, Phear, J., ordered on the application of Morrell to be made a party to the suit, that Morrell and Lightfoot should be made defendants in the suit, and appointed the Receiver of the Court to take possession of the property and carry out the trusts of the deed.

The defendant Morrell submitted (*inter alia*) that as the estates referred to in the deed were situated beyond the local limits of the Court, the Court had no jurisdiction to entertain the suit. The defendant Lightfoot, who resided in England, filed a written statement, in which he denied that Morrell had any authority to execute the deed of assignment on his behalf and submitted that he was not bound thereby, but that the deed was void and inoperative as against him.

The only issues material to this report were first "whether the plaint discloses any cause of action," and second "whether the Court has jurisdiction in the matter of the suit, the immoveable property mentioned in the plaint being admittedly out of the jurisdiction, when the defendant Lightfoot denies the execution of the deed of assignment comprising such estate, and is not personally subject to the jurisdiction."

PHEAR, J.—The first issue, which I am called upon to decide, is in these words, "whether the plaint discloses any sufficient

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cause of action ;" and I feel no difficulty in answering it in the affirmative. This Court as a Court of Equity, with the powers of the Court of Chancery, will, at the instance of a *cestui-que* trust, when necessary, compel an inactive trustee to do his duty, or facilitate a trustee's doing his duty by making declarations of fact or law, which shall bind parties properly brought before the Court for that purpose, or by acting directly upon parties before it who have control and power over the subject of the trust, and making them perform any obligations with respect to it which they may be under towards the trustee or to the *cestui-que* trust, and so on.

Now, in the present suit, the case made in the plaint is shortly as follows :—

In the events which have happened, the defendant Morrell has become sole and absolute owner of several specified grants of land in the districts of Backergunge and Jessore, subject to the charge thereon of certain small legacies, and the defendant Lightfoot is a partner with him in these grants and in the management and profits thereof to the extent of a two-anna share under a certain deed of partnership. Previous to and in July 1873, three large parcels of this property, which may be conveniently designated by the letters A, B, and C, respectively, and which constituted all the property that was of any considerable value, were so heavily encumbered, that the net income derivable from them was insufficient to keep down the interest on the debt. Afterwards these three parcels of the property were still further encumbered by two additional mortgages for sums of money amounting in the aggregate to Rs. 44,000. The total of the encumbrances on these three parcels was thus brought up to the sum of Rs. 5,73,000, the plaintiff Bank out of this sum being creditor for Rs. 28,000 on the security of a fifth mortgage on parcel A, a fourth mortgage on parcel B, and a third mortgage on parcel C, and being besides unsecured creditor for Rs. 3,329 on a bill of exchange.

In this state of things on the 14th May 1875, the defendant Lightfoot being then absent from India, the defendant Morrell, not only acting for himself, but also professing to act for Lightfoot under a power-of-attorney enabling him so to do, executed

in Calcutta a deed, by which he assigned *all* the abovementioned property, subject to the encumbrances just spoken of, and also all other property whatever of himself and Lightfoot, to the defendants Wordie and Longmuir on trust, among other things, to collect and call in all such part of the property assigned as should consist of money, and to sell and convert into money all the rest of the property, and out of the money so to be realized to pay the creditors of Morrell and Lightfoot in full, or ratably so far as the money would go. The defendants Wordie and Longmuir took upon themselves the trusts of the deed, and appointed Morrell their agent to manage the property until sale, and to collect arrears of rent, &c., under their directions. In pursuance of this arrangement, the defendant Morrell who, up to the date of the execution of the deed of trust, and during the absence of Lightfoot from this country, had been in sole possession and management of the immoveable property assigned, took over charge of the same from himself as owner to himself as the trustee's agent. But he found or made difficulty in the matter of collecting the rents, and mofussil creditors having instituted suits in the local Courts against Morrell and Lightfoot procured attachments before judgment to be placed on that property, or considerable portions of it. The defendant Lightfoot, also, upon learning of the transaction, repudiated Morrell's act on his behalf, and giving notice of his repudiation to the trustees, forbade them to deal in any way with his share of the property assigned to them in trust. Under these circumstances, the defendants Wordie and Longmuir are unwilling to proceed further in the matter of the deed of the 14th May 1875, and are desirous of being discharged from the trusts thereof, though, in their written statement, they express themselves ready to effect a sale of the property, provided the directions and assistance of this Court for that purpose can be obtained.

The plaintiff Bank is one of the creditors, in whose favor the deed of trust purports to have been made, and it seems to me plain that, if the substance of the case set up in the plaint is established, it would be accordant with the principles which govern the action of this Court, that it should afford him a remedy for the inactivity and weakness of the trustees by

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making a declaration as to the validity of the deed of trust, which would be binding on Lightfoot as a party who has appeared before the Court in this suit and by appointing a Receiver of the rents and profits of the immoveable property, which is the subject of the trust, and further by directing a sale of the property which would be binding on Morrell and Lightfoot, and would therefore pass a title, which they could not dispute. The plaintiff has therefore shown a right to seek the intervention of this Court, in other words a good cause of action.

The second issue questions the jurisdiction of this Court to entertain this suit on a somewhat complex ground, and I think it will be convenient at first to separate one of the ingredients of the issue from the rest, and to consider whether or not the suit is in its nature a "suit for land" within the meaning of the twelfth clause of the Letters Patent.

Now the cause of action in this suit, as we have just seen, does not, at any rate in any material degree, proceed from the trustees. The plaintiff wants to have a sale of the property effected, and for that purpose to have the obstacles, which arise from the conduct of Morrell and Lightfoot, and otherwise than from the trustees, removed by the Court. So far as the substance of this suit is concerned, the plaintiff's case is the same as if the trustees were out of the way, and Morrell and Lightfoot had bound themselves by covenant on sufficient consideration to sell the property and to divide the proceeds, according to the terms of the deed of 14th May 1875, among their creditors, of whom the plaintiff is one. The like transaction with the plaintiff as the sole creditor would manifestly be of the nature of a mortgage, and a suit by the plaintiff on the footing of it to obtain a realization of the charge by sale would be a suit for land within cl. 12 of the Letters Patent. It follows, I think, that the present suit also is a suit for land. Or to put it in another way, if the object of the suit had been to procure or sanction an immediate transfer of the land from the defendants Morrell and Lightfoot to the plaintiff, there could have been no question on the point. That the actual object is to procure the transfer of the land to a third person, who is to be

subsequently ascertained by auction-sale, and of the benefit of the consideration-money to the plaintiff and others, does not I think essentially alter the matter.

In this view, the second issue must be answered adversely to the plaintiffs, and the suit must be dismissed.

The plaintiff Bank appealed from this decision, on the ground that the Judge was wrong in holding that the suit was a suit for land within cl. 12 of the Letters Patent, and that he consequently had no jurisdiction to try it.

The *Advocate-General*, offg. (Mr. Paul) and Mr. Evans for the appellant.

Mr. Branson for the respondents Wordie and Longmuir.

Mr. Woodroffe and Mr. Macrae for the respondent Lightfoot.

Mr. Macrae and Mr. Macgregor for the respondent Morrell.

The *Advocate-General*.—The Court has power to grant the relief prayed for in this suit: it is not a suit for land within the meaning of the Letters Patent. From the frame of the suit, the relief prayed for may be given, either by directing the trustee defendants to carry out the trusts of the deed, or by discharging the trustees and appointing a Receiver to carry them out. Neither of these orders would be beyond the jurisdiction of the Court. The Supreme Court had the power of dealing in the same way with land out of its jurisdiction as the Court of Chancery has; and the High Court, on its Original Side has, by s. 9 of 24 and 25 Vict., cl. 104, the same power in this respect as the Supreme Court, except so far as it has been altered by cl. 12 of the Letters Patent. If not excluded by the words of that clause this suit will lie. It is submitted that "suit for land" means "suit for possession of land." Suits in which a Court of Equity makes orders *in personam*, though the subject-matter of the suit is out of the jurisdiction are not considered suits for land—*Penn v. Lord Baltimore* (1). So an order for carrying

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(1) 1 Ves. Sen., 444; S. C., 2 White and Tudor's Eq. Cas., 4th Ed., 923.

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out the trusts of the deeds in this suit would not be a suit for land. [GARTH, C. J.—Refers to *Abbott v. Abbott* (1), where it was held that an order directing a Receiver to sell land out of the jurisdiction was not *ultra vires*.] The latest case is *Juggodumba Dossee v. Puddomoney Dossee* (2). All these cases show that merely because a declaration is made with respect to land in a suit, that does not make it a suit for land—there are suits in which such declarations may be made which are not suits for land. As to the cases here this Court has held it has power to declare a trust in respect of lands in the mofussil.—*Bagram v. Moses* (3). Suits for foreclosure and redemption are not suits for land, though there have been decisions the other way. See *Bibee Jaun v. Meerza Mahomed Hadee* (4) and *S. M. Lalmoney Dossee v. Juddonath Shaw* (5). The latest English decision however holds that such suits are not suits for land—*Paget v. Ede* (6). And where there is no prayer for possession, as if the mortgagee is in possession, a suit for foreclosure is not a suit for land—*Blaquiere v. Ramdhone Doss* (7). The decisions of the Courts here as to such suits must not be considered conclusive. [GARTH, C. J.—Have there been any cases here in which the Court has decreed specific performance of contracts relating to land?] Yes, in *Ramdhone Shuw v. S. M. Nobumoney Dossee* (8). such a suit was entertained where the parties were resident in the jurisdiction. [PONTIFEX, J.—Refers to *Carteret v. Petty* (9), where a partition of lands out of the jurisdiction of the Court of Chancery was refused.] A decree for an account however was given in that case, see also *Houlditch v. Donegai* (10) and Seton on Decrees, p. 1038. It is submitted then that the Court has power to order the trustees to carry out the trusts of the deed. But the plaintiff contends further that the Court has power to remove the trustees and appoint a manager to carry out the trusts. The words of the Charter do not deprive the Court of jurisdiction it had previous to the Charter, nor has such jurisdiction

(1) L. R., 6 P. C., 220.

(2) 15 B. L. R., 318.

(3) 1 Hyde, 284.

(4) 1 I. J., N. S., 40.

(5) *Id.*, 319.

(6) L. R., 18 Eq., 118.

(7) Bourke, 319.

(8) *Id.*, 218.

(9) 2 Swanst., 323 note.

(10) 8 Bligh., 301.

been otherwise taken away. The Supreme Court had power to make such orders where the land was out of the jurisdiction—*Doe d. Bampton v. Petumber Mullick* (1), *Doe d. Muddoosudun Doss v. Mohenderlall Khan* (2), *Doe d. Chuttoo Sick Jamadar v. Subbessur Sein* (3), and *Tarramoney Dossee v. Kistnogovind Sein* (4). [GARTH, C.J.—I have some doubt at present whether a “suit for land” means more than a suit for possession of land, and whether it includes suits relating to or concerning land. Here however you ask for possession. I can understand a Receiver being appointed to receive rents where another person is in possession: but here you want the Receiver put in possession.] It is not a question of getting an order for possession; the trustees might be discharged conditionally on their putting the Receiver in possession. The plaintiff does not want the trustees removed at all, unless they are desirous of being discharged.

As to the defendant Lightfoot being out of the jurisdiction, that does not prevent the suit from proceeding. See *per* Peacock, C.J., in *Sterling v. Cochrane* (5). On the ground of convenience the arguments in favor of the suit being tried in this Court are unanswerable. A Mofussil Court could not carry out the trusts, or give the plaintiff the relief he prays for.

Mr. *Evans* on the same side referred to several cases in which the Court had made orders with respect to land out of the jurisdiction—*Macrae v. Macneill*, decided by Macpherson, J., on 14th May 1873. It was attempted in that case to distinguish it from *Bagram v. Moses* (6), inasmuch as in the latter case the defendant was personally subject to the jurisdiction, whereas in *Macrae v. Macneill* he was not. Macpherson, J., there dealt with the question of the title to the land, but refused to give possession. *Macdonald v. Scott*, 15th September 1873, decided by Macpherson, J., in which a right was decided as to a share of a Tea Garden in Assam, and a case of the same name before Pontifex, J.

(1) 1 Bignell, 24.

(2) 2 Boul., 40.

(3) *Id.*, 151.

(4) 2 Morley's Digest, 61.

(5) 1 B. L. R., O. C., 125—127.

(6) 1 Hyde, 284.

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[PONTIFEX, J.—There the point was not taken.] No, but land out of the jurisdiction was dealt with—*In re the Tagore estate*, where the old trustees were removed, and the Official Trustee was appointed trustee of lands at Rungpore. The Bombay High Court has held that a suit for the rent of lands in one district may be brought in another district where the defendant resides, although the plaintiff's title to the lands may incidentally come into question—*Chintaman Narayan v. Madhavrar Venkatesh* (1).

Mr. *Macrae* for the respondents *Morrell* and *Lightfoot*.—The cases cited by Mr. *Evans* are distinguishable in that the primary object of those suits was not for land. They come within the principle of the case of *Penn v. Lord Baltimore* (2), which we do not dispute. The person suing here is identical with the trustees; the plaint is verified by one of the defendants. *Longmuir*, the agent of the plaintiff Bank, is suing himself as one of the trustees. The trusts the plaintiff seeks to have carried out in this suit are such as are calculated to give the trustees in an indirect way beneficial possession of the land: that is the real scope and intention of the trust deed. [PONTIFEX, J.—Cannot we make a declaration of trust?] Not at any rate until the deed has been proved to be valid against *Lightfoot*: that is one of the questions raised by him. The whole case must be taken as stated in the pleadings. As in a recent case—*The East Indian Railway Company v. The Bengal Coal Company* (3)—the plaint may, on the face of it, show jurisdiction; but, when the defence is disclosed, it may appear to be a suit for land. [GARTH, C.J.—Suppose it were proved that *Lightfoot* is bound by the deed, would not the Court have jurisdiction to give what is asked for?] No, not to carry out the trusts of the deed: because to carry them out would be dealing with land in a way which is prohibited by the words of cl. 12 of the Letters Patent, *i. e.*, entertaining a suit for land out of the jurisdiction. [GARTH, C.J.—If *Lightfoot* is bound his interest is in the trustees, and the Court might make an order that the trustees should

(1) 6 Bom. H. C., A. C., 29.

(2) 1 Ves. Sen., 444.

(3) I. L. R., 1 Cal., 95.

carry out the trusts of the deed.] If Lightfoot were not a party to the suit, it would be a different suit: as it is, the real object is to obtain a declaration that a portion of the land is not Lightfoot's but belongs to the trustees, on the allegation that Lightfoot transferred it to them.

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The words of cl. 12 "suit for land" are, no doubt,^o vague, but a long course of decision has interpreted them as meaning more than "suit for possession of land." There is no need to go back to see what the jurisdiction of the Supreme Court was, as it brings us to the same question as to whether it is a suit for land. The latest case is *The East Indian Railway Company v. The Bengal Coal Company* (1), the object of which was to settle disputed boundaries. [GARTH, C. J.—That was clearly a suit for land. Is a suit for trespass to land a suit for land? It is so in England, for it is often brought admittedly to try title to land. *The Advocate-General.—Rajmohun Bose v. The East Indian Railway Company* (2) decided that a suit for trespass to land was not a suit for land.] That was the case of a nuisance, not of trespass to land. In *In re Leslie* (3), it was held that a suit on a mortgage for a decree for the amount due on it, or in default of payment for sale of land, was a suit for land; and see the cases referred to by Markby, J. in that case at page 177. In *Denonath Sreemony v. Hogg* (4), it was held that the Court could not deal with land in the mofussil, even though it was in the possession of the Court Receiver. *Juggodumba Dossee v. Puddomony Dossee* (5) was decided on the ground that the deed gave none of the parties any beneficial interest in the land: besides there all the parties were personally subject to the jurisdiction. *Bagram v. Moses* (6) decided that the Court had jurisdiction to declare that a party held land subject to a trust. We don't wish to question that. But more than that is wanted in this case. In *Ramdhone Shaw v. Nobumoney Dossee* (7) the contract was made within the jurisdiction. *Sterling v. Cochrane* (8) on the facts

(1) I. L. R., 1 Cal., 95.

(5) 15 B. L. R., 318.

(2) 10 B. L. R., 241.

(6) 1 Hyde, 284.

(3) 9 B. L. R., 171.

(7) Bourke, 218.

(4) 1 Hyde, 141.

(8) 1 B. L. R., O. C., 125.

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does not uphold the position it was cited to support. Whenever the main object of the suit is the possession of land, the suit is a suit for land. That was not the object in *Abbott v. Abbott* (1), and therefore the Court held it had jurisdiction to make an order as to the land. The main object of this suit is to take land from Lightfoot and Morrell, and vest it in the trustees. It is submitted it must be held to be a suit for land.

Mr. *Branson* rose to address the Court for the trustees but on the objection of Mr. *Woodroffe* that he ought not to be heard at this stage, the plaintiff Bank and the trustees being in the same interest, the Court refused to hear him.

Mr. *Evans* in reply pointed out that there was no identity between the plaintiff Bank, and Longmuir as a trustee. The Bank was a creditor, but nothing was due to Longmuir. The other side say they don't desire to question the decision in *Bagram v. Moses* (2). Now here the trustess are in absolute possession of at any rate fourteen-sixteenths of this property and of the other two-sixteenths as partnership assets. Cannot the Court make a declaration of trust, which can be carried out? [GARTH, C. J.—But they have not possession of the two-sixteenths if Morrell had no power to transfer it to them.] Morrell transferred it to them for his partner. If the Court has jurisdiction, is that jurisdiction to be ousted because a third person comes in and claims a portion? If our allegation that Lightfoot joined in transferring his interest gives the Court's jurisdiction, traversing that allegation does not take away the jurisdiction, but the issue should be tried whether or not he did transfer his interest. [GARTH, C.J.—It appears to me that as to the two-sixteenths it is a suit for land, and even as to the rest, I have great doubt whether it is not. What do you say as to Lightfoot's share?] It is vested in the trustees as a part of the partnership assets, the assignment of which might give Lightfoot a right to dissolve, or perhaps create a dissolution. If there is some portion of the land in the possession of the trustees,

(1) L. R., 6 P. C., 220.

(2) 1 Hyde, 284.

as to which the suit is not a suit for land, then it is submitted the Court has jurisdiction, although the title to another portion arises incidentally—*Chintaman Narayan v. Madhavrav Venkatesh* (1). [PONTIFEX, J.—I am by no means certain that as to the fourteen-sixteenths it is not a suit for land.] The trustees have accepted the trust, the assignor admits that they are trustees, and that he has assigned to them, and they are admittedly in possession of that portion. That is the case of *Bagram v. Moses* (2) an admitted trust by persons in the jurisdiction. Can the Court then not make a personal order on the trustees? [PONTIFEX, J.—In the case of *Juggodumba Dossee v. Puddomoney Dossee* (3), express care was taken in the decision to make it plain that there was not in any of the parties any beneficial interest in the land.] In that case, there was a claim to manage the land against parties who were in possession. Management of land implies practically possession of land. The order made in that case was one which made a change in the management or possession of land, and was therefore one affecting land. If cl. 12 is to paralyse the Court's action in every case in which there happens to be a piece of land out of the jurisdiction, great inconvenience will arise: for there is no other Court which could try such suits or which can give us the relief we ask for in this. The mere existence of a trust is a sufficient cause of action to enable the *cestui-que* trust to ask a Court of equity to administer it. On the decisions of this Court, it is clear the Court has power to deal with a suit, even though a question of title to land out of the jurisdiction should arise incidentally. Here there is a good trust as to a large portion of the property. The principle of *Bagram v. Moses* (2) is the proper one to apply to such a case as this.

Cur. adv. vult.

The judgment of the Court was delivered by

GARTH, C.J.—In this case, we think that the judgment of the Court below should be affirmed, upon the ground that the Court had no jurisdiction to entertain the suit.

(1) 6 Bom. H. C., A. C., 29.

(2) 1 Hyde, 284.

(3) 15 B. L. R., 318.

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The plaintiffs were, at the commencement of the year 1875, creditors of the defendants Morrell and Lightfoot to a very large amount. Morrell and Lightfoot were the owners at that time of certain land in the districts of Backergunge and Jessore, Morrell being entitled to a 14-anna share, and Lightfoot to a 2-anna share, in those lands. Morrell and Lightfoot were indebted, at that time, to several creditors, and the defendant Lightfoot, had left this country, and given Morrell certain powers-of-attorney to act for him during his absence. In this state of things, on the 14th of May 1875, Morrell, acting not only for himself, but professing to act for Lightfoot also, under the powers-of-attorney, executed in Calcutta a deed by which he conveyed the said lands (amongst other property) to the defendants Wordie and Longmuir, in trust, to call in such part of the property as consisted of money, and to sell and convert into money all the rest of the property, including the said lands; and, out of the money so to be realized, to pay the creditors of Morrell and Lightfoot, either in full, or ratably, as far as the money would go.

The defendants Wordie and Longmuir took upon themselves the trusts of the deed, and appointed Morrell their agent, to manage the property until the sale under their direction. The trustees, however, found considerable difficulty in carrying out the trusts; and the defendant Lightfoot, upon hearing of the deed, repudiated the transaction altogether, and denied, and still denies, Morrell's authority to deal thus with his share of the property under the powers-of-attorney. Upon this, Wordie and Longmuir were unwilling to proceed any further in the execution of the trusts, and were desirous of being discharged from their responsibilities under the trust deed; whereupon the plaintiffs as creditors largely interested under that deed, instituted this suit, praying that the trusts of the deed might be carried into effect, that the trustees might be relieved from the execution of the trusts, and that a Receiver or Manager might be appointed to carry out the trusts under the order of this Court.

To this suit an objection has been raised, on behalf of the defendants Morrell and Lightfoot, that the Court has no power to entertain such a suit, inasmuch as it is a "suit for land"

within the meaning of the 12th clause of the Charter, the land being situated in the mofusil.

The plaintiffs contend that this is not so; that the lands, which are sought to be affected, are only a portion of certain partnership properties belonging to Morrell and Lightfoot; and that the object of the suit is merely to enforce the carrying out of a trust created by Morrell for the joint benefit of Lightfoot and himself, and in order to effect a beneficial arrangement with their joint creditors.

In support of this view, several authorities have been cited on behalf of the appellants, all founded more or less upon the principle laid down by Lord Hardwicke in *Penn v. Lord Baltimore* (1) and in the notes upon that case, that Courts of Equity will exercise their powers *in personam*, in the case of trustees and other resident within their jurisdiction, to oblige such persons to perform trusts, to carry out contracts, and to obey the rules of equity, even where the subject-matter of the trust, or contract, or equity, may be land situate out of their jurisdiction; see *Bagram v. Moses* (2), and *Paget v. Ede* (3).

But those cases are all more or less distinguishable from the present, which depends not so much upon the jurisdiction generally exercised by Courts of Equity, as upon whether this suit is brought substantially "for land;" that is, for the purpose of acquiring title to, or control over, land, within the meaning of a particular clause in the Charter; and we think, having regard to what is the real object of the suit, and to what are the rights and contentions of the respective parties, it is impossible to say that this is not substantially a suit for land.

The express purpose of the suit is to compel the sale of the whole of the land conveyed by the trust deed, including Lightfoot's share. But then Lightfoot objects that his share is not subject to the trust at all, because Morrell had no power, or authority, to deal with it; and, therefore, one of the main points, which the plaintiffs seek to establish, and which they ask the Court to decide, is the title of the trustees to Lightfoot's share. Surely, in that respect the suit is, strictly speaking, one "for land."

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(1) 2 White and Tudor's Eq. Cas.,
4th Ed., 923.

(2) 1 Hyde, 284.

(3) L. R., 18 Eq., 118.

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But then the plaintiffs say that is not the sole, or primary object of the suit; and that, as regards Morrell's share in the property, which is by far the largest portion of it, there is no question as to the trustees' title. But it was repeatedly, during the argument, put to the learned Counsel for the plaintiffs, and distinctly admitted by them, that it would be impossible for the Court to deal effectually with the case, unless Lightfoot's share were included, as well as Morrell's.

That being so, and the suit being confessedly instituted for the purpose of dealing with the lands in their entirety, and these lands being by far the larger portion of the partnership assets, we are of opinion that this is in substance a suit for land within the meaning of the clause in question, and that the judgment of the Court below was perfectly correct.

The appeal will therefore be dismissed with costs on scale No. 2.

Appeal dismissed.

Attorney for the appellants: Mr. *Adkin*.

Attorneys for the respondents: Mr. *Knowles*, Mr. *Upton*, and Messrs. *Dignam* and *Robinson*.

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Pontifex.

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March 15

§

May 2.

COHEN AND ANOTHER (PLAINTIFFS) v. CASSIM NANA (DEFENDANT).

Damages, Measure of—Action for Breach of Contract—Collateral Contract.

The defendant entered into a contract with the plaintiffs to purchase from them a quantity of gunny bags, of which the defendant was to take delivery at certain stated times. On failure by the defendant to take delivery, the plaintiffs brought a suit for breach of the contract, estimating the damages at the difference between the contract price and the market prices on the days when the defendant ought to have taken delivery. It was proved that the plaintiffs never had the goods in their possession, but that they could have obtained them under a contract they had with a third person, and it was found that the plaintiffs were ready and willing to deliver them at the time contracted for. The lower Court held that the measure of damages was the difference between the contract price of the bags, and the amount which it cost the plaintiffs under their collateral contract to procure and deliver them.

Held, reversing the decision of the Court below, that the proper measure of damages was the difference between the contract price and the market prices at the dates of failure by the defendant to take delivery.

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APPEAL from a decision of Phear, J., dated the 19th July 1875.

The suit was brought to recover Rs. 3,900 as damages for breach of contract in not taking delivery of certain gunny bags. On the 5th June 1874, the defendant entered into a contract with the plaintiffs to purchase from them 3,60,000 Borneo gunny bags, at Rs. 29 per hundred bags; 30,000 to be delivered each month from January to December 1875, half the quantity to be given and taken by the 15th, and half by the end of each month: each instalment to be paid for on delivery. The defendant failing to take delivery of the bags, which ought, according to the contract, to have been taken on 28th February, 15th March, and 31st March respectively, the plaintiffs brought this suit, estimating their damages at the difference between the contract price and the market prices on the days on which the defendant ought to have taken delivery.

The defence was, that the plaintiffs were not ready and willing to deliver the gunny bags according to the contract, and that the plaintiffs had not sustained the damages alleged. From the evidence it appeared that the plaintiffs were, in June 1874, under contract with the Barnagore Jute factory, to take a certain quantity of bags from them monthly; and it was from this supply that the plaintiffs proposed to deliver bags to the defendant in accordance with their contract. Evidence was given also of the market price of gunny bags of the kind contracted for as having been at the end of February 1875 from Rs. 20 to Rs. 21 per 100; at the middle of March, Rs. 20; and at the end of March, Rs. 19.

The decision of Phear, J., was as follows:—

PHEAR, J.—I have already expressed the opinion that the plaintiffs had the means of performing the contract according to its terms, had they been asked to do so by the defendant, and that the defendant committed a breach of the contract by not asking for and taking delivery of the number of bags which are the subject of suit at the times mentioned in the plaint.

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The defendant is, therefore, bound to pay to the plaintiffs by way of damages such an amount of money as will place them pecuniarily in the same position as they would have been in had the contract been duly carried out in the particulars complained of. And it is plain that if the plaintiffs, at the times mentioned, had the bags in their hands ready to deliver, and with the full right to sell to whom they chose, they could, on the defendant making default, have sold the bags in the market, and therefore the bags being left on their hands as a consequence of the defendant's breach, must be taken to be worth to them the market price of the day, and the damages which would give them the same benefit as the contract would be the difference between the market price and the contract price. In delivering the judgment of the Court of Exchequer Chamber in *Barrow v. Arnaud* (1) Lord Chief Justice Tindal said: "Where a contract to deliver goods at a certain price is broken, the proper measure of damages in general is the difference between the contract price and the market price of such goods at the time when the contract is broken, because the purchaser having the money in hand may go into the market and buy. So if a contract to accept and pay for goods is broken, the same rule may be properly applied, for the seller may take his goods into the market and obtain the current price for them." But this measure of damages is obviously only applicable to suits of the present kind *i.e.*, suits where the vendor is plaintiff, when the effect of the defendant's default is to leave the subject of the contract at plaintiff's disposal and possessed of a market value. In other cases the principle which led to it must be directly applied. See *Cort v. Ambergate Railway Company* (2).

In the present case, the plaintiffs never at any time had bags in their possession or at their disposal as owners independently of the defendant; their means of performing their contract was furnished by a, so to speak, collateral contract, which they could call upon the Barnagore Company to carry out, provided the defendant paid cash on delivery; for Mr. Landale said he would have sent down to Calcutta the required number of gunny bags on condition only of the shipping order being left in his hands until

(1) Q. B., 605.

(2) 20 L. J., Q. B., 460.

payment. And the failure of the defendant to ask for and take delivery of the specified number of bags did not leave these bags at the plaintiff's disposal and bearing a market value, but only rendered the plaintiffs less able than before to complete their own contract with the Barnagore Company.

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We must therefore enquire, what would have been the pecuniary position of the plaintiffs in the matter of the bags at the specified times if the defendant had remained true to the contract. They would, I suppose, have put into their pocket as profit the difference between the contract price of the bags and the amount of money which it cost them under their contract with the Barnagore Company to procure and deliver the bags. In the events which have happened, I understand from the evidence that the plaintiffs have been obliged to pay to the Barnagore Company compensation for not having been able to carry out their general contract with the Company. So much of this compensation, if any, as can be traced directly to the defendant's default, is, as matters stand, actual loss occasioned thereby, but as to what it amounts to I have no means whatever of forming an estimate.

In the argument which I have had the advantage of hearing since I threw out the above view at the termination of the trial, Mr. Jackson for the plaintiffs cited some well-known cases to establish, as he contended, that it is a rule of law in all suits for breach of contract of sale by either party that the damages should be measured by the difference between the market price and the contract price at time of breach, unless the defendant proved this measure to be erroneous. But all of these were cases in which either the purchaser sued the vendor for non-delivery, or the vendor having the goods in his hands ready to deliver and a market to sell in, sued the purchaser for non-acceptance, and in each of these classes the difference between the market price and the contract price undoubtedly represents, as has been already remarked, the amount of money required to put the plaintiff in the same position as he would have been in if the contract had not been broken.

In particular Mr. Jackson relied upon *Roper v. Johnson* (1),

(1) L. R., 8 C. P., 167.

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but that was a suit by a purchaser of goods against a vendor for breach of contract before the day named for delivery, and the only question was, what was the date to which the damages were to be referred. Mr. Justice Brett puts the peculiarity of the case thus (p. 180): The general rule as to damages for the breach of a contract is, that the plaintiff is to be compensated for the difference of his position from what it would have been if the contract had been performed. In the ordinary case of a contract to deliver marketable goods on a given day, the measure of damages would be the difference between the contract price and the market price on that day. Now, although the plaintiff may treat the refusal of the defendant to accept or to deliver the goods before the day for performance as a breach, it by no means follows that the damages are to be the difference between the contract price and the market price on the day of the breach." And the Court held that the damages were to be estimated as of the day appointed for delivery, not as of the day of breach. I do not find anything in the case which can serve as a guide in the present.

Mr. Jackson also urged, that it must be taken that the plaintiffs, whatever their contract with the Barnagore Company, could at any rate have supplied themselves with the means of carrying out their contract with the defendant by purchasing in the bazaar at the price of the day, and that if they had done so, their profit which they have lost, by reason of the defendant's default, would have been the difference between that market price and the defendant's contract price.

But this seems to me fallacious. It appeared on the evidence before the Court that the plaintiffs had *not* the means of purchasing the requisite number of gunny bags in the bazaar; and had it not been for their contract with the Barnagore Company and the evidence of Mr. Landale as to the peculiar terms on which he would have furnished them for delivery to defendant, I could not possibly have found that the plaintiffs were ready to deliver so as to entitle them to claim damages from the defendant for non-acceptance. The plaintiffs' readiness and ability to deliver is inseparable from their contract with the Barnagore Company, which in itself has not been

performed. Without some knowledge therefore of the terms of this contract, it is impossible to estimate what the position of the plaintiffs would have been, if the defendant had not committed the breach for which he is sued. Had the Barnagore contract been performed, and the plaintiffs so got their bags in hand, of course the case would have been different, and the market price measure would have been applicable.

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Mr. Jackson then asks me to assume that the plaintiffs could get their bags from the Barnagore Company at the time when delivery on their part was needed at the market price of that date, but there is no evidence whatever to warrant this assumption. On the contrary, I suppose it certain that they could not have got them there at any other price than that at which they contracted to take them, and although this price is not disclosed, it is more than probable that it was higher than the market prices at the times of the defendant's breach.

Lastly, Mr. Jackson appealed to Sedgwick on Damages, 4th ed., page 320 : "Where, however, the plaintiff has not the goods that he agrees to sell, but makes a side contract with another party to furnish them, he will only be allowed to recover the difference between the original contract price and the market price at the time of the offer with interest."

Unfortunately, the authorities referred to in this passage are not accessible to us; but I imagine if they could be examined they would be found to deal with cases in which the side contract had been executed, and the vendor plaintiff either had at his disposal the goods which he sued the defendant for not taking, or at any rate that as against the defendant it could be taken that he was ready and willing to deliver in the ordinary sense. And probably, judging from the phraseology of the text, the decisions merely ruled as against the plaintiff that the market price was the lower limit of the measure of damages, even though the side contract price had been lower still, and so the plaintiff's actual loss of profit greater than the measure.

In the circumstances of the present case, it appears to me that the market price at the times appointed in the contract for delivery bears no relation, and affords no clue, to the amount of damage or loss which the plaintiffs have in fact sustained

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by reason of the defendant's default, and there is nothing in the decided cases to give it the arbitrary value for this purpose, which Mr. Jackson contends for.

And when I endeavour to ascertain from the evidence what the plaintiffs' loss really was, I find no materials in the evidence for forming an opinion. I have not the slightest means of judging what it would have cost them to procure and deliver the bags to the defendant had the latter been ready to take and pay for them at the times appointed therefor; and consequently I cannot arrive at any definite estimate of the amount of profit which they would have derived from a proper performance of the contract by the defendant and which they have lost by his default, neither can I tell how much or what amount of the money out of pocket which they have paid by way of compensation to the Barnagore Company for their own shortcomings is directly attributable to the defendant's failure to carry out this present contract. At the same time I am satisfied that the plaintiffs have sustained some loss, whatever it may be, under both heads; and I think, on a view of all the facts of the case, that I cannot be wrong in awarding them Rs. 500 in respect of it, though I admit that my grounds for taking this round sum in preference to any other are of the most general kind. In cases such in character as the present evidently is, there is special need for care that no damages be given which cannot be placed upon a sound basis.

Decree for damages Rs. 500, and costs No. 2.

From this decision, the plaintiffs appealed, on the ground that the damages ought to have been estimated at the difference between the contract price of the goods and the market prices at the time when delivery ought to have been taken.

Mr. Jackson Mr. (*Woodroffe* with him) for the appellants.

Mr. Macrae for the respondent.

Mr. Jackson contended that the usual principle as to estimating the damages was to be applied in the present case: that principle applied not only when the party complaining of the

breach has the goods in his possession, or at his disposal, but also to cases where he could have procured them. Here the plaintiffs could have obtained the bags by reason of the contract with the Barnagore Company; it is found in the Court below that they were ready and willing to deliver them. There was evidence of the market rate at the date of the failure of the defendant to take delivery, and the measure of damages should be the difference between the market price at that time and the contract price—this would be the amount sued for. The learned Counsel referred to *Roper v. Johnson* (1), *Sedgwick on Damages*, 4th ed. p. 320, § 283, and the cases there cited, and Act IX of 1872, s. 73, Explanation (h).

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Mr. *Macrae* for the respondent.—The plaintiffs to entitle them to recover must show actual loss: here they have not suffered any: damages awarded them would be an actual profit, without their having undergone any corresponding risk. Apart from the contract with the Barnagore Company, the plaintiffs could not have procured bags like those contracted for in the market on the days they ought to have been delivered. If so their proper course was on breach by the defendant to go into the market and sell the bags: they did not do this, because they had not then got the bags, and therefore could not have been ready to deliver them. *Roper v. Johnson* (1) was a case different from the present: that was an action by the purchaser against the vendor for non-delivery: in a case like the present by a vendor against a purchaser for non-acceptance, the plaintiff still has the goods, assuming his readiness to perform his contract, and might afterwards sell them at a profit. [PONTIFEX, J.—If your contention is right, the plaintiff, in every case of breach of contract, would have to show, not only his ability to perform his contract, but also have to prove every contract he had entered into to enable him to carry out the contract he is suing upon.] No, I do not contend that; but the plaintiffs must show they have sustained some loss by the breach of the contract. S. 73 of Act IX of 1872 makes provision for compensation for loss sustained

(1) L. R., 8. C. P., 167.

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by the plaintiff by breach of contract; here they have suffered no loss. The market price of Borneo gunny bags is no proof of the price of bags of the size contracted for, inasmuch as no Company sells only one kind of bag: it is submitted there is no reliable evidence of the market price.

Mr. *Jackson* in reply.—There is evidence of the market price of bags of “this quality;” that means “of the kind contracted for.” The plaintiffs are entitled to the amount by which the contract price exceeds that which they could have obtained when the defendant failed to take delivery. See s. 73, Act IX of 1872, Explanation (c). The case of *Cort v. Ambergate Railway Company* (1), referred to by Phear, J., is, it is submitted, in the plaintiffs’ favor; see *per Campbell, C.J.*, at page 144. On breach of a contract for sale of goods, the purchaser is not bound to buy other goods, nor is the vendor bound to sell at once in the market.

Cur. adv. vult.

The judgment of the Court was delivered by

GARTH, C.J., (after shortly stating the contract, his Lordship continued):—There is no doubt in this case as to the plaintiffs’ right to recover; and the only question is as to the amount to which they are entitled.

It is admitted that the defendant refused to accept the bags, which were to have been delivered on the 28th February, and on the 15th and 31st March 1875: and it was found as a fact by the learned Judge in the Court below, and we entirely agree with him in so finding, that the plaintiffs were ready and willing to deliver the bags on these above dates.

It was proved, on the part of the plaintiffs, that these gunny bags were marketable articles in Calcutta; and Mr. Alexander Landale, who is a broker, stated that the greater portion of the gunny bag business passed through his hands, and that, in the month of February 1875, the price of Borneo gunny bags was from Rs. 20 to Rs. 21 per 100; at the middle of March, Rs. 20; and at the end of March, Rs. 19 per 100.

(1) 20 L. J., Q. B., 460; S. C., 17 Q. B., 127.

This witness does not appear to have been cross-examined, and no evidence was offered by the defendant to contradict or qualify his statement.

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Here then we have a contract, by which the plaintiffs agreed to supply the defendant with certain marketable goods at specified periods, and a breach of that contract by the defendant in not accepting the goods, which the plaintiffs were prepared to deliver at three of those periods. What then is the measure of damages to which the plaintiffs are entitled?

According to the ordinary and well-established rule, they would, under such circumstances, be entitled to recover the difference between the contract price of the goods and the market price at the time of the breach: see the judgment of the Exchequer Chamber in *Barrow v. Arnaud* (1). But the learned Judge in the Court below has considered that, in this particular case, the ordinary rule did not apply, and for this reason: The plaintiffs, although prepared to deliver the goods in accordance with the contract, never had them in their actual possession, nor could they have procured them in the general market. Their only means of obtaining them was under a contract which they had entered into with the Barnagore Company, upon the terms (amongst others) that they should pay for them in cash, which cash they looked to obtain on each delivery from the defendant. Mr. D. G. Landale, the Manager of the Company, stated in evidence, that he was quite ready to supply the bags upon either receiving cash or holding the shipping documents as security. These circumstances appear to have led the learned Judge to the conclusion that in this case the ordinary rule for assessing the damages did not apply; and that the proper course was to endeavour to ascertain the extent of the plaintiffs' actual loss having regard to the terms of his contract with the Barnagore Company. He then proceeds to say in his judgment that he finds no materials in the evidence which enable him to form an opinion of the plaintiffs' actual loss; and in the result he awards them Rs. 500, avowing at the same time that he arrives at that sum upon no particular principle or estimate.

(1) 8 Q. B., 605.

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We cannot think that this is a correct or legal mode of assessing the amount of damages; and we are unable to discover any good reason why the terms of the plaintiffs' contract with the Barnagore Company should affect the question of damages, or why the ordinary rule of assessment should not be adopted in this case. It was undoubtedly quite right to enquire into the arrangement between the plaintiffs and the Barnagore Company in order to ascertain whether the plaintiffs were ready and willing to deliver the bags on the days specified; but that question having been decided in the plaintiffs' favor, it is difficult to see how the terms of that arrangement could possibly affect the question of damages as between the parties to this suit. As long as the plaintiffs were prepared to deliver the goods, it appears to us immaterial how and where they obtained them, or at what price. Whether they cost the plaintiffs much or little, they were entitled to receive from the defendant the contract price, and in the event of the defendant's non-acceptance, they had a right to charge him with the difference between that price and the market price at the time of the breach. In contracts for the supply of large quantities of marketable goods, more especially when the goods are to be delivered from time to time over a long period, it rarely happens that the seller has the goods in his actual possession. In contracts by a mine owner for the supply of coals, or by manufacturers for the supply of marketable manufactured articles, or by timber merchants for the supply of timber for large undertakings, the subject of sale has generally to be worked, or manufactured, or obtained, as the contract provides; and yet in all such cases, the seller, in the event of the buyer's non-acceptance at the time mentioned in the contract, has a right to recover damages from him, ascertained according to the ordinary rule. If in each of such cases the Court was bound to enquire what it cost the mine owner to get the coals, or the manufacturer to make the articles,—or the merchant to buy the timber, the enquiry would not only be endless, but it would be introducing a novel, and we consider an incorrect, principle of ascertaining the extent of plaintiffs' loss.

In the case of *Cort v. The Ambergate Railway Company* (1), which appears to have been somewhat relied upon in the Court below, it will be found that the goods, which were the subject of sale, were not marketable articles, nor was it suggested in the course of the argument that they were so. The contract there was for the supply of several thousand tons of railway chairs, which, from their very nature, would not be bought and sold in any general market, and, consequently, the ordinary rule affecting marketable articles would not apply to such a contract.

In this view, we are of opinion that the ordinary rule does apply, and we therefore award the plaintiffs the sum of Rs. 3,900, claimed in the plaint, which is a somewhat smaller sum than the evidence would warrant.

The appeal is decreed with costs on scale No. 2.

Appeal allowed.

Attorneys for the appellants: Messrs. *Chauntrell, Knowles, and Roberts.*

Attorney for the respondent: Mr. *Goodall.*

APPELLATE CIVIL.

Before Mr. Justice L. S. Jackson and Mr. Justice McDonell.

HURRYMOHUN SHAHA (DEFENDANT) *v.* SHONATUN
SHAHA (PLAINTIFF).*

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March 2.

Hindu Law—Inheritance—Stridhan.

With respect to property given to a woman after her marriage by her husband's father's sister's son, the brother, mother, and father are preferable heirs to the husband.

SUIT by a Hindu, to recover certain immoveable property as heir to his deceased wife. The plaintiff alleged that the pro-

* Special Appeal, No. 1501 of 1875, against a decree of the Subordinate Judge of Zilla Dacca, dated the 30th of April 1875, reversing a decree of the Sudder Munsif of that district, dated the 22nd of August 1874.

(1) 20 L. J., Q. B., 460; S. C., 17 Q. B., 127.

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perty in dispute had been given to his wife after her marriage by the defendant, who was the plaintiff's father's sister's son. Amongst other grounds of defence, the defendant, in his written statement, contended, that the plaintiff could not inherit or claim his wife's stridhan, inasmuch as her mother, father and brother were all living.

The Munsif did not go into this question, but dismissed the suit upon other grounds. On appeal the Subordinate Judge reversed the Munsif's decision as regards the grounds on which it rested. As regards the plaintiff's right to maintain the suit as the right heir under the Hindu law to the property claimed, he said:—"The plaintiff's right of inheritance is questioned, and thus I have to decide, first, whether plaintiff has such right of property as to have a right of action against the defendant. According to Hindu law, the property, under the denomination of annadheya, gift subsequently given by her kindred, means anything given to her by her father or mother or by her brother, and the heir to such property is the brother in preference to her husband, *vide* Shamachurn's Vyavastha, sec. 463, first edition (1). But to property not given by her father or kindred, the husband first succeeds; sec. 466 (2). In the present case, the gift was not by the father, or kindred of the donee, and the husband therefore is the heir. Upon these grounds, I find the plaintiff has a right of action."

From the above decision, the defendant now appealed.

Baboo *Mohinee Mohun Roy* (Baboo *Lall Mohun Dass* with him) contended, that, on the death of the plaintiff's wife, her brother, and not the plaintiff, was entitled to succeed to her stridhan, and that this suit was consequently not maintainable. He cited the *Dayabhaga*, Chap. iv, §§ 10 and 16, and the *Vyavastha Darpana*, 2nd edition, vyavastha 470, cl. 3, and the first column of the table of succession to a childless married woman's stridhan given at p. 733.

Baboo *Hurry Mohun Chuckerbutty* for the respondent.—§ 10, Chap. iv, sec. 3 of the *Dayabhaga* is one of several para-

graphs, viz., §§ 4 to 28, in which the order of succession to the separate property of a childless woman is discussed, and the result of the discussion is summed up by Jimuta Vahana in § 29, where, in support of his conclusion, he quotes the text of Catyayana "That which has been given to her *by her kindred* goes, on failure of kindred, to her husband," thereby clearly indicating the scope of the previous discussion. [JACKSON, J.—It is expressly stated in § 10 that "wealth, received by a woman, after her marriage, from the family of her husband, goes to her brothers, not to her husband."] In his summary of the Chapter Srikrishna says of property not received at the wedding, and not given by the father, that, in the absence of the persons specified by him, "the order is the same with that of property received at Brahma nuptials," i.e., the husband comes first. In the present case, it is not contended that any of the persons there specified are in existence, and the plaintiff is accordingly the preferable heir. The other authorities are clearer than the Dayabhaga, see the Dayatattwa, Chap. x, §§ 10 and 26, and the Dayakrama Sangraha, Chap. ii, sec. 4, §§ 10 and 11. Sec. 5 shows that the only exception to the general rule now recognised is with regard to gifts subsequent by the father, see also Macn. Pr. H. L., pp. 38—40. But assuming that the brother is the preferable heir to property received after the marriage from the family of the husband, it is submitted that the defendant, the donor in this case, is not a member of the plaintiff's family; see Dayabhaga Chap. iv., sec. I, § 3.

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Baboo Mohinee Mohun Roy in reply contended, that the defendant was a sapinda of the plaintiff, and must therefore be deemed a member of his family, and he referred to the judgment of Mitter, J., in *Judoonath Sircar v. Bussunt Coomar Roy Chowdry* (1), as showing that the plaintiff was not the preferable heir to the property in dispute.

The judgment of the Court was delivered by

JACKSON.—The question which we have been called upon

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to consider in this special appeal is whether the plaintiff has any right to maintain the present suit as the right heir, under the Hindu law, to the property which is claimed in this suit. That property was given to the deceased wife of the plaintiff after their marriage and during the continuance of the marriage state by the husband's father's sister's son. It is admitted that this property was the stridhan of the deceased wife, and that the plaintiff claims it as being preferable heir to such property on her decease. This was a matter objected to by the defendant in his written statement. The Munsif dismissed the suit upon other grounds, but did not go into this question. On appeal before the Subordinate Judge, he reversed the decision of the Munsif as regards the grounds on which it rested, and, having then to decide this question, he disposed of it in this wise.

(The learned Judge read the portion of the Subordinate Judge's judgment set out above, and continued):—

There is some obscurity in the language of this judgment, but, setting that aside, I must observe that it is not satisfactory to find a Subordinate Judge, himself a Hindu and sitting in a Court of appeal, disposing of a question of this kind merely on the authority of a text book, however valuable, such as Baboo Shamachurn Sircar's Vyavastha Darpana. That is a book of which I am far from underrating the excellence, but after all it is merely a collection of various authorities upon the main points of Hindu law, and any Judge, who has to decide a question of this description, ought undoubtedly to refer to those authorities themselves, although, in the decision of it, he is of course not precluded from considering and using such a valuable commentary as that of Baboo Shamachurn Sircar. I think we are bound to decide the case entirely upon the authority of the Dayabhaga, and if we can satisfy ourselves as to the meaning of the author of the Dayabhaga on this question, it will be unnecessary to go to any inferior authority. But we have the express authority of Jimuta Vahana himself. In Chap. iv, sec. iii, the question of succession to the separate property of a childless woman is fully discussed, and we find that the author, after propounding the text of Yajnyavalkya in the second verse of that section, goes on, and in the fourth verse,

says :—" It is not right to interpret the text as signifying that any property of whatever amount which belongs to a woman married by any of those ceremonies termed Brahma, &c., whether received by her before or after her nuptials, devolves wholly on her husband by her demise;" he goes on to give reasons for that, and then we find it stated in the 10th verse of the same chapter and the same section; " But wealth received by a woman after her marriage, from the family of her father, of her mother, or of her husband, goes to her brothers (not to her husband), as Yajnyavalkya declares, that which has been given to her by her kindred, as well as her fee or gratuity, and anything bestowed after marriage, her kinsmen take, if she die without issues : " and after the brother there is no doubt, that, where the husband does not first take, the mother and the father come in between. The husband, therefore, in such a case would not be the heir, if the text applies, until after brother, mother, and father. The question is whether the text applies to this case. It seems to me that it very clearly does. The property in dispute is undoubtedly wealth received by a woman after her marriage, and it was received, not from the family of her father, or of her mother, but from the family of her husband. That the expression " family of her husband," includes the degree of kindred in which the donor of this property stood to the deceased woman I have no doubt. The question was raised before us to-day whether such a relation could be properly called *sapinda*. It is not necessary that we should decide that point, but we think that the " family of the husband " is a term wide enough to include this kind of relation, and it appears to us that, if the Subordinate Judge, in deciding this appeal, had looked carefully to the very author to whom he does refer, he would have found ample authority so far as the book itself goes for not coming to the conclusion that he arrives at. He appears to have referred to text 473, which is at page 722 of the second edition of the book; but if he had referred to the preceding texts, 470 and 471, he would have found what we now decide set out very fully, and moreover in the table of succession set out at page 733 we find that the order of succession to property given by the parents before

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marriage or *bestowed after marriage*, is, first the brother, second the mother, third the father, and fourth the husband. Pages 712 and 720 are here referred to us, showing what was meant by the words "bestowed after marriage," and the explanation is given under the third branch of vyavastha 470, which says:—"Wealth received by a woman after her marriage, from the family of her father or mother or of her husband, goes to her brothers." A great deal has been sought to be made of the language of the Dayakrama Sangraha and Dayatattwa upon this point, but it seems to us that the contention so raised is based entirely upon the very concise language used in some places by the authors of those two books who, when they mean to designate a particular class of persons, use the person who heads the class to designate the whole. We are reminded by Baboo Mohinee Mohun Roy, who argued this case for the appellant, of the careful explanation given of this very matter by my late colleague, Dwarkanath Mitter, J., in the very able judgment which he delivered in the case of *Judoonath Sircar v. Bussunt Coomar Roy Chowdry* (1), a judgment to which I was a party, and in which I at the time entirely concurred. For these reasons we think that in this case the plaintiff is not the next heir, and therefore the Subordinate Judge has come to an erroneous decision on the point of Hindu law involved, and that his judgment must be set aside, and the plaintiff's suit dismissed with costs.

I am bound to say that, as far as we have been able to judge, it seems to us that it is a suit which in every way deserves to be dismissed on the merits. I should observe that the contention that the donor of this property is not a member of the husband's family involves the contention that he was a stranger, and this is contrary to the admitted fact that the property was *stridhan*.

Appeal allowed.

(1) 11 B. L. R., 286.

APPELLATE CRIMINAL.

Before Mr. Justice Macpherson and Mr. Justice Morris.

THE QUEEN *v.* GOBIN TEWARI AND ANOTHER.

Criminal Procedure Code (Act X, 1872), s. 272—Arrest pending Appeal.

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April 7.

In an appeal under s. 272 of Act X of 1872, the High Court has power to order the accused to be arrested pending the appeal.

IN this case, the accused Gobin Tewari and Judoo Lall had been tried on a charge of murder by the Sessions Judge of Bhaugulpore, and released: and against this acquittal, the Government appealed. On the admission of the appeal, the *Legal Remembrancer* applied for the re-arrest of the accused.

[MACPHERSON, J.—Why should not the prisoners be re-arrested under s. 92 of the Criminal Procedure Code?] (1).

The Legal Remembrancer (Mr. H. Bell) submitted that the Court had power to order the arrest of the accused persons. It was true that s. 272 did not expressly give the Court this power, but it was a power which was impliedly vested in the Court. Where a Court had jurisdiction over an offence, it had of necessity power to bring the persons accused of the offence before it—*Bane v. Methuen* (2).

The admission of the appeal revived the charge against the accused; and it was absurd to treat persons accused of murder as mere respondents in an appeal. Before the appeal was heard, the accused ought to be in the custody of the law. If the accused were treated as respondents, and merely served with notice of the appeal, it would be open to them after the appeal had been heard, and a capital sentence had perhaps been passed upon them, to plead that they had never been served with notice of the appeal. In such a case what would the Court do. There was no

(1) See *Queen v. Gholam Ismail*, I. L. R., 1 All., 1.

(2) 2 Bing., 63.

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provision in the law for rehearing an appeal. Under s. 297, when the Court ordered that an accused person who had been improperly discharged be tried, it was not disputed that the Court could order the re-arrest of the accused person though there was no express provision on the point in the section: and in the same way he submitted that the Court had equal authority to direct the re-arrest of the accused on the admission of an appeal under s. 272.

MACPHERSON, J.—Let the Magistrate be directed to re-arrest Gobin Tewari and Jodoo Lall, and keep them in custody till the hearing of the appeal.

Application granted.

Before Mr. Justice Macpherson, Mr. Justice Markby, and Mr. Justice Morris.

1876
 March 28.

IN THE MATTER OF THE PETITION OF MOHESH MISTRÉE AND ANOTHER.*

Criminal Procedure Code (Act X of 1872), ss. 294, 295, 296, and 297—Order of Discharge under s. 215—Revival of Proceedings.

An order of a District Magistrate, directing the revival of certain criminal proceedings against the petitioners who had been discharged under s. 215 of the Criminal Procedure Code by a Subordinate Magistrate after evidence had been gone into, quashed as illegal and *ultra vires*.

As the case was one of improper discharge and came before the Magistrate under s. 295 of the Criminal Procedure Code, the proper and only course for him was to report it for orders to the High Court, which, if of opinion that the accused were improperly discharged, might, under s. 297, have directed a retrial.

The case of *Sidya bin Satya* differed from.

APPLICATION to set aside an order of the Magistrate of Alipore for the revival of certain criminal proceedings against the petitioners, discharged by the Cantonment Magistrate of Barrackpore under s. 215 of the Code of Criminal Procedure.

The facts of the case material to this report are as follow:—In July 1875, one Gopal Malla charged the petitioners with

* Criminal Motion, No. 53 of 1876, against the order of the District Magistrate of the 24-Pergunnas, dated the 10th February 1876.

causing hurt to him, in the Court of the Cantonment Magistrate of Barrackpore, then presided over by Colonel Elderton, who heard the evidence for the prosecution and called upon the petitioners for their defence. Before the disposal of the case, however, he was relieved in his office by Captain Hopkinson, who refused to decide the case on the evidence taken before his predecessor, and heard the case *de novo*. Captain Hopkinson, who was a Magistrate of the first class, did not believe the evidence tendered on behalf of the prosecution, and discharged the petitioners.

The complainant thereupon applied to the Magistrate of the district, praying for a revival of the case, on the ground that all his witnesses were not examined by Captain Hopkinson. The District Magistrate, upon such *ex parte* statement, on the 10th of February 1876, ordered the revival of the case, holding that, "as the case was one triable under Chapter XVII of the Criminal Procedure Code, the order for the discharge of the accused persons should not have been passed without hearing all the witnesses for the prosecution." The Magistrate also added that he had no doubt that the High Court would quash the order of discharge if the case came before them; but he did not think it necessary to make any reference, in as much as a discharge under s. 215 was not equivalent to an acquittal, and did not bar a fresh enquiry into the same fact. He accordingly directed the Joint Magistrate to proceed afresh with the case against the petitioners under Chapter XVII of the Criminal Procedure Code.

The petitioners applied to the High Court, on the 1st of March 1876, to have the above order quashed as illegal and made without jurisdiction, and, upon such application, a rule was issued by Macpherson and Morris, JJ., on the prosecutor, to show cause why the order of the 10th of February should not be set aside, and the records were sent for under s. 294 of the Criminal Procedure Code. There being some doubt on the point raised before the High Court, owing to the case of *Sidya bin Satya*, decided by the Bombay High Court, and referred to in the notes to s. 215 in the 5th edition of Prinsep's Criminal Procedure Code, the rule came on for hearing on the 28th of

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March before three Judges, *viz.*, Macpherson, Markby, and Morris, J.J.

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Baboo *Brojonauth Mitter* for the petitioners.

No one appeared for the Crown.

The judgment of the Court was delivered by

MACPHERSON, J.—It seems to us to be clear that this case came before the Magistrate of the 24-Pergunnas under s. 295 of the Criminal Procedure Code, and that it was in the first instance dealt with by the Magistrate under that section. That being so, his proper and only course was to proceed under s. 296, to report the case for orders to the High Court, which (under s. 297) might have ordered the accused persons to be tried, if of opinion that they had been improperly discharged.

A case (*re Sitya bin Satya*) quoted by Mr. Prinsep in his latest edition of the Criminal Procedure Code, as having been decided by the Bombay High Court, has been referred to as showing that the Magistrate was right in the course he adopted. But that case is not reported in the regular reports of the Bombay High Court: nor have we been able to find any report of it. The full facts with which the Bombay Court had to deal are not before us, and we are unable to say how far the Court may really have gone. The note we have of this decision is therefore of little value; and, taking it as it stands, we are not prepared to agree with it as regards cases coming before the Magistrate under s. 295.

Dealing with the matter under ss. 294 and 297, we think there is material error in the Magistrate's proceeding, and that his order, directing the Joint Magistrate to entertain the fresh complaint now made and all the subsequent proceedings, ought to be quashed.

Whatever may have led to the various delays which have occurred in the prosecution of this case since the 21st of July 1875, there is no doubt that every great and unfortunate delays have taken place. It is, as a rule, most unfair and undesirable

in every way to order an accused person to be tried over and over again for the same offence, unless under very peculiar circumstances. In the present instance there is nothing peculiar in the circumstances to warrant a third trial: and it seems to us wrong and improper (within the meaning of s. 294) that an order should be made directing the prosecution to be now recommenced.

The order of the 10th of February and all the subsequent proceedings are quashed.

Order quashed.

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MISTRER.

ORIGINAL CIVIL.

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Pontifex.

HARRIS v. HARRIS.

HARRIS v. KOYLAS CHUNDER BANDOPADIA.

1876

May 16.

Husband and Wife—Married Woman's Property Act (III of 1874), ss. 7 and 8—Succession Act (X of 1865), s. 4—Action for Trover—Wife against Husband.

The plaintiff was, at the time of her marriage in 1870, possessed in her own right of certain articles of household furniture, given to her by her mother. Since January 1875 she had lived separate from her husband, but the furniture remained in his house. In February 1875, her husband mortgaged the property to *B*, without the plaintiff's knowledge or consent. In June 1875, one *KCB*, a creditor, obtained a decree against the husband and *B*, in execution of which he seized the furniture as the property of the husband, and it remained in Court subject to the seizure. In July 1875, the plaintiff instituted a suit in her own name in trover to recover the articles of furniture or their value from her husband, on the ground that they were her separate property, and in August 1875 she preferred a claim in her own name to the property under s. 88 of Act IX of 1850. It was found on the facts that the furniture was the property of the plaintiff. The husband and wife were persons subject to the provisions of the Succession Act, s. 4, and the Married Woman's Property Act, 1874.

Held that, under s. 7 of the latter Act, the suit was maintainable against the husband.

Held also, that the judgment for the plaintiff in the suit, to recover the furniture or its value from the husband, could not, without satisfaction, have

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the effect of vesting the property in the husband from the time of the conversion, and therefore the claim under Act IX of 1850 was also maintainable.

Brinsmead v. Harrison (1) followed.

CASE referred for the opinion of the High Court, under s. 55, Act IX of 1850, by G. C. Seonce, the Officiating First Judge of the Calcutta Small Cause Court.

The material portion of the reference was as follows :—

“The first suit was instituted, in her own name, on the 12th July 1875, by Ella Harris, a married woman, against her husband. It is a suit in trover to recover certain household furniture, alleged by the wife to be her separate property, or its value.

“Ella Harris is an East Indian woman. She was married to her husband P. H. Harris in Calcutta, on the 24th of January 1870, at the Church of the Sacred Heart, Dhurumtollah. They are both Roman Catholics. They lived and cohabited together at 22, Kenderdine's Lane, where the husband still resides. The wife's mother, Mrs. Noel, lived with them, and still resides there with Mr. Harris. P. H. Harris is the son of one J. M. Harris, who died in Calcutta in 1865. The son believes that his father was born in England, but he had long made Calcutta his home, and had acquired a domicile here. P. H. Harris was born in Calcutta, where he has always lived, and he had no other domicile. He has no relatives in England. He is 25 years old, and employed in the Military Secretariat. On the 20th January 1875, Mrs. Harris left her husband, and eloped with a man called Margray, who was afterwards prosecuted by the husband to conviction for adultery. The wife has not since returned to her husband, but lives with some friends at 7, Emambaugh Lane in Calcutta. The marriage has never been dissolved.

“The plaintiff, was at the time of marriage, possessed of the articles of furniture in her own right, which were given to her by her mother. A wing almirah was bought by Mrs. Noel, the mother of Mrs. Harris, about a year after her daughter's marriage, and given by her to her daughter. The present value of all the property is stated to be Rs. 200. The property until very lately remained in the husband's house and under his charge. Subsequently to the separation, the plaintiff demanded

the above property from her husband, who, on the 11th June 1875, sent her the following letter: "It is not for me to deprive you of your property, you are, therefore, at liberty to take it away whenever you want, and in whatever way you please." Mr. Harris afterwards refused to give up the property, telling his wife, she might, if she could, recover it through the Court. After his wife left him, Mr. Harris mortgaged the property in February 1875, without her knowledge or consent, to one Mr. Bouchez, but the property remained in his (Harris') own house. Bouchez subsequently, on the 17th June, obtained a decree against him, which is still unsatisfied. On the 12th July, Mrs. Harris instituted in her own name the suit in trover against her husband, to recover the property or its value. The husband did not appear to defend the suit brought against him, but I considered his evidence necessary in both suits which are now before the Court, and I desired his attendance that he might be examined personally."

After setting out s. 4 of Act X of 1865, and ss. 7 and 8 of the Married Woman's Property Act, 1874, the Judge, who referred the case, continued:—"I entertain considerable doubt whether the Legislature intended so absolutely to abolish the doctrine of unity of person between husband and wife as to enable them to sue each other during the marriage, about the right to possession by one or the other of some portion of the furniture in what should be the common dwelling-house, or about some petty debt: and I do not apprehend that such suits ever would be brought, except upon some domestic difference, more or less serious, arising.

"I now come to the second suit. It is an interpleader suit, instituted, on the 18th August 1875, by Ella Harris in her own name, against Koylas Chunder Bandopadia, who obtained judgment against P. H. Harris and Mr. Bouchez on the 25th June 1875 last. Koylas Chunder Bandopadia, on the 11th August, in execution of his decree, by a warrant of this Court, seized all the articles but one which Mrs. Harris claims in the suit against her husband, supposing them to be the property of P. H. Harris, his judgment-debtor. The property is at present in Court under the seizure. It was

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seized in the house 22, Kenderdine's Lane, where Ella Harris had left it. Baboo Odoy Chunder Bose, the pleader, who appeared on behalf of Koylas Chunder Bandopadia, contended that, if the plaintiff recovered a judgment against her husband in the trover suit, that such judgment would vest the property in the goods in the husband from the time of the conversion, and that therefore the articles, when seized by Koylas Chunder Bandopadia in execution of his decree, must be deemed to be the property of P. H. Harris, the judgment-debtor."

After referring to the *dictum* of Jervis, C.J., in *Buckland v. Johnson* (1) and the case of *Brinsmead v. Harrison* (2), and finding on the evidence that the articles claimed in this suits were the property of Mrs. Harris and not of her husband, the learned Judge gave judgment for the plaintiff in both suits contingent on the opinion of the High Court, as to whether under the circumstances stated, the suits or either of them were maintainable.

No Counsel appeared for either party in the High Court.

The following was the opinion of the Court:

GARTH, C.J.—We are of opinion that both these suits have been correctly decided.

Mrs. Harris was entitled as against her husband to the property in question, and could sue him for it under s. 7, Act III of 1874.

If the suit was to recover the articles themselves or their value, it was in form an action of *detinue*, not of trover; but, whatever the form may have been, we are of the same opinion as the Court of Common Pleas in *Brinsmead v. Harrison* (3), that a judgment in such a suit, without satisfaction, does not change the property in the goods. The true explanation of the doctrine attributed to Jervis, C.J., in *Buckland v. Johnson* (4)

(1) 15 C. B., 145, see pp. 162 & 163.

(2) L. R., 6 C. P., 384; see p. 588, *per* Willes, J., and the same case on appeal, L. R., 7 C. P., 547, *per* Blackburn and Lush, JJ.

(3) L. R., 6 C. P., 584.

(4) 15 C. B., 145.

is this, that a man who has recovered the value of his goods in one action in the shape of damages, shall not be allowed to recover the goods themselves in another action; but this reason only applies when the damages have been actually recovered.

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PRIVY COUNCIL.

JUMOONA DASSYA (PLAINTIFF) v. BAMASOONDARI DASSYA
(DEFENDANT).

P. C.*
1876
Feb. 8, 9, &
10.

[On appeal from the High Court of Judicature at Fort William in Bengal.]

Adoption, Suit to set aside—Infant Marriage—Presumption as to Age—Power of Minor to give permission to adopt—Regs. X of 1793, s. 33, and XXVI of 1793, s. 2—Minor under Court of Wards—Onus probandi—Estoppel.

The foundation for infant marriages among Hindus is the religious obligation which is supposed to lie on parents to provide for a daughter, so soon as she is *matura viro*, a husband capable of procreating children; the custom being that when that period arrives, the infant wife permanently quits her father's house, to which she had returned after the celebration of the marriage ceremony, for that of her husband. The presumption, therefore, is, that the husband, when called upon to receive his wife for permanent cohabitation, has attained the full age of adolescence and also the age which the law fixes as that of discretion.

According to the Hindu law prevalent in Bengal, a lad of the age of fifteen is regarded as having attained the age of discretion, and as competent to adopt, or to give authority to adopt, a son.

Semle.—The operation of s. 33, Reg. X of 1793, which, read together with s. 2, Reg. XXVI of 1793, prohibits a landholder under the age of eighteen from making an adoption without the consent of the Court of Wards, is confined to persons who are under the guardianship of the Court of Wards.

Quere, whether a decree in favour of the adoption passed in a suit by a reversioner to set aside an adoption is binding on any reversioner except the plaintiff; and whether a decision in such a suit adverse to the adoption would bind the adopted son as between himself and any other than the plaintiff.

APPEAL from a decision of the High Court, Calcutta (KEMP and PONTIFEX, JJ.), dated the 14th February 1873, reversing

* *Present*.—SIR J. W. COLVILLE, SIR B. PEACOCK, SIR M. E. SMITH, AND
SIR R. P. COLLIER.

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DARI DASSYA.

a decision of the Subordinate Judge of Rajshahye, dated the 26th February 1872.

The plaintiff Jumoona Dassya sued to set aside the adoption of a son by the defendant Bamasoondari Dassya, who was the widow of the plaintiff's deceased son Gobind Chunder Mozoomdar. The case was governed by the Hindu law prevalent in Bengal, under which a widow has no power to adopt without the sanction of her husband. Bamasoondari alleged that the adoption was made by her in conformity with a written authority to that effect executed by her husband shortly before his death. The plaintiff contended that this writing was a forgery contrived to defeat the reversionary interest of herself and her daughters in the property which had belonged to her son. In the first Court the written authority to adopt was held to be a forgery, and the plaintiff had a decree in her favour. On appeal the High Court held the authority to adopt to be proved, and on an objection that was taken as to Gobind Chunder's power to execute the permission to adopt, inasmuch as he was then a minor, they found that though not of full age he had arrived at years of discretion, and were of opinion that, on the authority of *Rajendra Narain Surma Lahoree v. Saroda Soonduree Dabee* (1), the deed of permission to adopt was not invalid by reason of his minority. They therefore dismissed the plaintiff's suit with costs. From this decision the plaintiff appealed to Her Majesty in Council.

The facts of the case are fully disclosed in their LORDSHIPS' judgment.

Mr. *Doyle* for the appellant :—The written authority to adopt set up by the plaintiff is a forgery, and even if it were genuine it is invalid. [Sir J. COLVILLE.—What interest have you which entitles you to bring this suit?] The plaintiff has a reversionary interest. But for this adoption she would be heir to her son on Bamasoondari's death. She sues on her own behalf and on behalf of her daughter. [Sir J. COLVILLE.—You are suing for a declaration of rights which are remote and contingent, does not the case of *Kathama Natchiar v. Dorasingu*

Teval apply (1).] Our suit was brought under an apprehension that if delayed it might become barred under the Limitation Act, No. IX of 1871, which by article 129 of schedule II, allows only twelve years from "the date of the adoption or, at the option of the plaintiff, the date of the death of the adoptive father," within which to bring a suit to set aside an adoption.

Assuming that the alleged authority to adopt was in fact executed by Govind Chunder Mozoomdar, he was at the time a minor and incapable of granting such a power without the consent of his guardian. According to the plaintiff's witnesses, Govind, at the time of his death, was not more than twelve or thirteen years of age, but taking his age to have been between sixteen and seventeen as deposed to by the defendant's witnesses, the case falls under s. 33, Reg. X of 1793, and s. 2; Reg. XXVI of 1793, the effect of which is to declare that no adoption by a landholder under the age of eighteen shall be deemed valid without the previous consent of the Court of Wards. [Sir J. COLVILLE.—Reg. XXVI of 1793 does not alter the general law as to the minority of Hindus, but says that in particular cases the age of eighteen shall be the age of majority.] Had Govind Chunder been under the Court of Wards he must have had the consent of the Court of Wards; on the same principle we contend that not being under the Court of Wards he could not validly adopt without the consent of his guardian. [Sir M. SMITH referred to the observations made by their Lordships in their judgment in *Ameeroonnissa Khatoon v. Abadoonnissa Khatoon* (2). Sir J. COLVILLE.—The Regulations of 1793 referred to seem only to apply in respect of estates of which possession has been taken by the Court of Wards. The disqualified persons under the Regulations are owners of the estates of which the Court of Wards has taken charge. Here the minor was not under the Court of Wards. We cannot extend positive law by analogy or parity of reasoning. Moreover, Reg. X only says that an adoption by the minor shall not be valid. Does that prevent his giving a valid authority to adopt?] I would say *a fortiori* it does. [Sir J. COLVILLE.—There may be reasons why a minor

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(1) 15 B. L. R., 83; S. C., L. R., 2 Ind. Ap., 169.

(2) 15 B. L. R., 81; S. C., L. R., 2 Ind. Ap., 108.

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should not be himself allowed to adopt, which would not extend to his giving a power to another.] It is submitted that no person can give a power to another to do that which he cannot do himself. The late Sudder Court held that the Regulation applied as well to a power to adopt, as to an adoption—*Anundmoyee Chowdrain v. Sheeb Chunder Roy* (1). [Sir M. SMITH.—The case does not seem to have been argued before the High Court on the question whether Govind Chunder was a minor by statutory enactment. The Judges do not notice that point. They consider the question of minority under the Hindu law. If it is a question of statutory law, it does not matter whether Govind was twelve or seventeen, if he was not eighteen.] The Judges of the High Court say that Govind was not of full age. An adoption by a minor has no civil effect. See *Vyavastha Darpana*, sec. 521, p. 770, and secs. 206, 207 at pp. 396, 397.

Mr. *J. D. Bell* for the respondent.—There can be no argument from analogy in respect of statutory law, and Reg. X of 1793 only applies where the minor is under the Court of Wards. In Bengal a Hindu who has attained fifteen years of age has an uncontrolled power to adopt—*Rajendro Narain Lahoree v. Saroda Soonduree Dabee* (2). But if a guardian's consent were necessary, the evidence is that it was given. The question of minority does not however really arise in the case. If Govind Chunder was only twelve years of age, the defendant's case was false from the beginning.

Mr. *Doyne* replied.

Their LORDSHIPS' judgment was delivered by

SIR J. COLVILE.—This is an appeal against the decree of the High Court of Calcutta, which, reversing a decree of the Subordinate Judge of Zilla Rajshahye, dismissed the plaintiff's suit.

The suit was brought by a Hindu widow, Jumoona Dassya, against her daughter-in-law, Bamasoondari Dassya, who was sued in her own right, and also as the guardian of *Giris*

(1) S. D. A., 1855, p. 218.

(2) 15 W. R., 548.

Chunder Mozoomdar, whom she had adopted under an authority alleged to have been executed by her deceased husband. The object of the suit, which may be taken to be a suit between Jumoona Dassya and the infant adopted, was to set aside that adoption, and to have it declared invalid. Jumoona was the widow of Guru Pershad, who died in the year 1851. He left, besides his widow, two sons, Govind Chunder and Gopal Chunder, and three daughters. On his death-bed he executed a wasiutnamah, the effect of which was to constitute his widow the guardian of the two sons, and manager of his property during their minorities, with a direction that, on their attaining majority, the elder should take a nine-anna share, and the younger only a seven-anna share of his estate. Govind Chunder, the eldest son, died in the year 1853. He had, according to the custom of Hindus, been married in his father's lifetime, whilst yet a child of tender years, to another child some years younger than himself. It is alleged on the part of the defendants that on his death-bed, the day before his death, he executed a document authorising his widow to adopt a son; and the truth of this allegation is the principal question in the cause.

If the adoption stands good, the adopted son is not only entitled as actual possessor to the share of Govind Chunder, his adoptive father, but upon the death of Jumoona, will, if then living, become entitled to take the share of the other brother, who died unmarried, and whilst still a child, in preference to the sisters of his father. On the other hand, if the adoption is invalid, Jumoona, if she survives Bamasoondari, will become entitled on the death of the latter to the share of her eldest son. This contingent interest is the only *locus standi* which she has in the present suit; although the desire to strengthen the future and contingent claims of her daughters may have been an additional motive for bringing it.

Various questions were raised in the suit which are now of no moment. The only substantial issues are, first, whether Govind Chunder did execute the alleged authority to adopt; and, secondly, if he did so, whether he was by reason of his age capable of executing such a document.

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Their Lordships think it will be desirable, in the first place, to come to a clear conclusion upon a question which has been very much disputed in the cause, namely, the age of Govind Chunder at the time of his death, because it is one which bears upon both the issues to be now determined. It bears of course directly upon the latter of them, and it bears indirectly upon the former, inasmuch as the older Govind Chunder was, the more probable is it that he would desire to execute such a document as that in question.

The contention in the present suit is, that although Bamasoondari was, at the time of her husband's death, 11 or 12 years old, he was only between 13 and 14; that there was not a difference of more than two years between them. That there can be any doubt now as to the age of Bamasoondari, is, their Lordships thinks, impossible. (After stating an admission of Jumoona that there was a difference of about four years between the age of Bamasoondari and that of her husband, his Lordship continued :) The question of Bamasoondari's age was solemnly tried and determined between her and her mother-in-law in the suit of 1860. The horoscope of Bamasoondari was then produced, and the finding of the Judge made it perfectly clear that she must have been, at her husband's death, of the age of 11 or 12 years. The result of that suit, no doubt, has been the *consensus* of the witnesses on both sides in the present suit as to the age of Bamasoondari. But the effect of the admission of Jumoona remains, and there is no reason why we should come to any conclusion other than that the difference of age between Bamasoondari and her husband was that which was originally stated. Their Lordships, moreover, think there is great force in the observations of Kemp, J., a Judge admittedly of large experience as to native usages and customs upon this point. He thinks that Hindu marriages are usually arranged so that there is a difference considerably more than one or two years between the age of the husband and wife; and their Lordships think this is probable and reasonable. The foundation upon which marriages between infants, which so many philosophical Hindus consider one of the most objectionable of their customs, are supported,

is the religious obligation which is supposed to lie upon parents of providing for their daughter, so soon as she is *matura viro*, a husband capable of procreating children; the custom being that when that period arrives, the infant wife permanently quits her father's house, to which she had returned after the celebration of the marriage ceremony, for that of her husband. Therefore, it is to be expected, both for physical and moral reasons, that marriages should be arranged so that the husband, when called upon to receive his wife for permanent cohabitation, should have attained the full age of adolescence, and also the age which the law fixes as that of discretion.

Their Lordships, therefore, upon the evidence, have no difficulty in coming to the conclusion that Govind Chunder was, at the time of his death, of the age of 15 or 16, and, therefore, of an age which, according to the law prevalent in Bengal, is to be regarded as the age of discretion.

(His Lordship then examined the evidence bearing on the execution of the authority to adopt, the conclusion being that the decision of the High Court was not to be disturbed. He then continued):—

The only remaining point is that taken by Mr. Doyne, to the effect that although Govind Chunder may have been of the age of discretion according to the Hindu law as prevailing in Bengal, he was still a minor under the 2nd section of Reg. XXVI of 1793, and that under the 33rd section of the prior Reg. X of 1793 he could not make the adoption without the consent of his guardian. The last-mentioned enactment prohibits a disqualified proprietor from making an adoption, except with the sanction of the Court of Wards; and it has been determined by the Sudder Court in the case cited, *Anundmoyee Chowdrain v. Sheeb Chunder Roy* (1), a case which afterwards came here, though not on the same point (2), that the prohibition applies equally to an authority to adopt and to an actual adoption. But the words of the 33rd section of Reg. X of 1793 would seem to confine its operation to persons who are under the guardianship of the Court of Wards. And we have the judgment of Mitter, J., to

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(1) S. D. A., 1855, p. 218.

(2) See 9 Moore's L. A., 287.

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the effect that where a minor is not under the Court of Wards, but has attained years of discretion according to the Hindu law, he is capable of executing such an instrument as this—*Rajendro Narain Lahoree v. Sarodu Soonduree Dabee* (1). If then the case actually turned upon this point, their Lordships' opinion would have been that Govind Chunder was not incapacitated from executing this instrument by reason of his not having attained the age of 18 years. If however, the consent of Jumoona was, as their Lordships think they must take it to have been, given to the execution of the instrument, the particular objection thus taken by Mr. Doyne would not arise.

Their Lordships have dealt with this case as if the question were one fairly open for trial between the parties. They give no opinion as to what the effect of a decree in such a suit may be, whether one in favour of the adoption is binding against any reversioner except the plaintiff, or whether, on the other hand, a decision adverse to the adoption would bind the adopted son as between himself and anybody except the plaintiff. All their Lordships can do on the present occasion is to say that Jumoona has not made out her right to have this adoption declared invalid, and they must humbly advise Her Majesty to affirm the judgment under appeal, and to dismiss this appeal with costs.

Appeal dismissed.

Agent for the appellant: Mr. *T. L. Wilson*.

Agents for the respondent: Messrs. *Nickinson, Prall* and *Nickinson*.

(1) 15 W. R., 548.

APPELLATE CIVIL.

Before Mr. Justice L. S. Jackson and Mr. Justice McDonell.

LOKENATH GHOSE (ONE OF THE DEFENDANTS) *v.* JUGOBUNDHOO ROY (PLAINTIFF).*

1875
Dec. 14 & 21,
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April 25.

Lessor and Lessee—Lease granted while Lessor is out of Possession—Rights of Lessee—Suit for Possession.

A transfer of property, of which the transferor is not at the time of the transfer in possession, is not *ipso facto* void.

Where a patnidar, while out of possession of the patni estate, granted a durpatni thereof, *held* that the dur-patnidar's suit against third persons, who were in possession of the estate, to recover possession would lie, it appearing that the plaintiff had paid an adequate consideration for the durpatni, and that the durpatni potta was not evidence of a contract to be performed in future on the happening of a certain contingency, or that if it were so that the plaintiff had done all he was bound to do to entitle him to specific performance of the agreement by the patnidar.

THE plaintiff sued for a declaration of his durpatni and char-patni rights in certain estates and for possession. He alleged that he had obtained in 1278 (1871) a durpatni of an 8-anna share in the properties mentioned in the plaint from Grish Narain Roy and Mohendro Narain Roy, the heirs of Bykunt Nath Roy, the patnidar of the said share; that he afterwards granted a sepatni of one of the estates to one Krishto Bullubh Roy and again took from the latter a char-patni; and that, on attempting to take possession of the estates, he was opposed by the defendants.

The defendants contended, amongst other things, that the ikrar of 1278 from Grish Narain Roy and Mohendro Narain Roy in the plaintiff's favor showed that the plaintiff's title had not become complete and that neither Bykunt Nath Roy nor his heirs Grish Narain and Mohendro Narain were ever the owners of the patni or in possession thereof, and that the plaintiff had never obtained possession of the estates granted in durpatni.

* Regular Appeal, No. 211 of 1874, against a decree of the Subordinate Judge of Zilla Moorshedabad, dated the 30th of June 1874.

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The original ikrar of 1278 was not forthcoming, but a copy was put in evidence which, so far as material, was as follows:—

“1st. I shall pay rent for the durpatni mehal from the date on which I shall get possession thereof, and within one month from the date of my obtaining possession, I shall pay the balance of the consideration money for which I have given a bond. If I fail herein, I shall pay with interest at the rate of one per cent. per month. If from any cause the crops of the entire mehal or of any portion of it are injured in the future, I shall get back from you with interest at the rate of one per cent. per month consideration money in proportion to the injury which my interest will suffer, and you will also grant an abatement of rent in that proportion.

“2nd. From this time I shall pay out of the amount due to the zemindar whatever you have to pay into the Collectorate under assignment regarding the zemindar’s sudder rent as per towji of the mehals mentioned in the patni-potta and the profit which after deducting the same, you have to pay to the zemindar. If I do not get possession of the durpatni mehals at present, you will pay me the rent which will be paid to the Collectorate and the zemindar during the said period of dis-possession, with interest at one per cent. per month from the amount which you will receive from other parties on account of wasilat for the period that I may be out of possession in my durpatni time. If that be deficient you will pay me yourselves. After deducting from the said durpatni rent the Col-lectorate rent of Rs. 5,223-5-5 and the zemindar’s profit of Rs. 2,731-10-7 mentioned above, which I shall pay from the date on which I shall get possession of the entire mehal, I shall go on paying you the remaining profit of Rs. 1,100. If I fail to pay the Collectorate and zemindar’s rent, and the mehal is consequently sold by auction, I shall be responsible for the loss or damages which will result therefrom.

“3rd. If for obtaining possession of this property I or you have to institute any suit in the Court or in the Collectorate, I shall pay the amount of costs and you will pay me that amount. If the suit is decreed you will receive the costs which will be stated in the decree and the wasilat for the period of

dispossession, and if it is dismissed you will pay the costs which will be incurred by the opposite party and there will be no concern with me."

The plaintiff paid the consideration for the durpatni partly in costs and partly by a bond, the due date of which had not arrived when this suit was brought.

It was admitted on the part of the plaintiff that Grish Narain Roy and Mohendro Narain Roy were not in possession when they granted the durpatni.

The first issue tried by the Subordinate Judge, and the only issue material for the purpose of this report, was whether under the terms of the ikrar executed by Grish Narain and Mohendro Narain in favour of the plaintiff the plaintiff's suit for possession would lie. This issue he decided in the plaintiff's favour, holding that the rulings cited by the defendant, *viz.*, *Raja Sahib Prahlad Sen v. Budhu Singh* (1) and *Ranee Bhobosoondree Dasseah v. Issur Chunder Dutt* (2) did not apply, the facts of the present case being quite dissimilar, and that he considered the cases of *Pran Kristo Dey v. Bissumbhur Sen* (3) and *Tara Soonderry Debya v. Shama Soonderry Debya* (4) to be authority for the position that a transfer by one who has a right of possession, but who is not in possession, is not void on that account, and that in the present case there was no suggestion even that the plaintiff had not done all he was bound to do, and, as he had been distinctly empowered by his lessor to sue alone, that the transfer to him was complete, and that the present suit would lie. Having also decided the other issues in the plaintiff's favor he gave him a decree for possession of the half share of the several mehals. From this decision the principal defendant appealed.

Baboo *Gopal Lal Mitter* and *Lucky Churn Bose* for the appellant.

Baboo *Mohiny Mohun Roy*, *Gooroodoss Banerjee*, and *Kishory Mohun Roy* for the respondent.

(1) 2 B. L. R., P. C., 111 at p. 117;
S. C., 12 Moore's I. A., 275 at p. 307.

(2) 11 B. L. R., 36.

(3) 11 W. R., 81.

(4) 4 W. R., 58.

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The arguments raised and the cases cited appear in the judgment of the Court which was delivered by

JACKSON, J. (who, after stating the facts and the holding of the Subordinate Judge on the first issue tried as above, and briefly stating the findings on the other issues, continued):— In appeal the first point argued was that the Subordinate Judge ought to have dismissed the plaintiff's case on the strength of the Privy Council Rulings cited by the (defendant) appellant. Great stress was laid upon the fact that Grish Narain and Mohendro Narain were admittedly not in possession at the time they granted the lease, which formed the basis of the plaintiff's claim, and it was pointed out that the *ikrar*, dated 17th Assar 1278, clearly showed that the full payment of the consideration was contingent on the result of this litigation, and that thus the suit was eminently a speculative one. The rulings cited by the (defendant) appellant before the Subordinate Judge as well as *Tara Soondaree Chowdhrair v. The Collector of Mymensingh* (1), *Ram Khelawun Singh v. Mussamut Oudh Kooer* (2), *Bhoodhun Singh v. Mussamut Luteefun* (3), and *Bishonath Dey Roy v. Chunder Mohun Dutt Biswas* (4), were referred to in support of the appellant's contention. Now the ruling in *Tara Soonduree Chowdhrair v. The Collector of Mymensing* (1) only shows that where the vendor was a defendant in the suit, and the agreement was only to sell as much as was recovered, the suit could not be maintained as contrary to public policy. In the ruling in *Ram Khelawun Singh v. Mussamut Oudh Kooer* (2), the principle laid down was that wherever a party executed a deed of sale of property not in his possession, this should be held to be only a contract to sell. In *Bhoodhun Singh v. Mussamut Luteefun* (3), it was ruled that an assignee of property is not entitled to recover against his assignor, on the footing of a champertous contract, and that an assignee of property, whose assignor was not in possession when the assignment was made

(1) 13 B. L. R., 495.

(3) 22 W. R., 535.

(2) 21 W. R., 101.

(4) 23 W. R., 165.

can only recover even from the hands of third persons, upon showing that he should have a right to enforce specific performance of his contract against his assignor, if the property were to come back to the hands of the assignor. The ruling in *Bishonath Dey Roy v. Chunder Mohun Dutt Biswas* (1), lays down the proposition that alleged purchasers whose vendors were not in possession, and who pay nothing for what is said to have been sold to them, are not competent to maintain a suit for possession of the property in dispute. The ruling in *Rajah Sahib Prahlad Sen v. Budhu Sing* (2) has been fully discussed by the Subordinate Judge.

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None of these rulings in our opinion apply to the present case. The present case was not brought for the specific performance of a contract, and there is nothing to show that the plaintiff has not performed his part of the contract. The contract may be a speculative one, but there is nothing to show that the plaintiff purchased at a sum below the value of the thing sold. The stipulation in the ikrar, regarding the refusal of part of the consideration money in case of loss of the thing sold tends to show that the price paid was adequate. There is nothing in the present case to show that the durpatni potta was evidence of a contract to be performed in future on the happening of a certain contingency, or that if it were so that the plaintiff has not done all he was bound to do, if a suit for the specific performance of the contract were brought. The ikrar in the present case shows that the transfer was in substance complete. The warranty clause at the end of the first paragraph shows not only that the consideration money was paid, but that under certain contingencies it would be refunded.

In none of the cases relied on by the appellant has it been held that a transfer of property of which the transferor is not at the time of such transfer in possession would be *ipso facto* void.

The rulings in *Bikan Singh v. Mussamat Parbutty Kooer* (3) *Chedambaru Chetty v. Renja Krishna Muthu Vira Puchanja*

(1) 23 W. R., 165.

(2) 2 B. L. R., P. C., 111 ; S. C.,

(3) 22 W. R., 99.

12 Moore's I. A., 275.

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Naiker (1), and *Gungahurry Nundee v. Raghubram Nundee* (2) point to a contrary conclusion. In the first of these cases it was ruled that where a conveyance of property was made by a person who had been in possession and enjoyment for years before, and he was wrongfully ousted, the conveyance gave a right to sue for immediate possession. In the second the Lords of the Judicial Committee of the Privy Council pointed out that the statute of champerty has no effect in the mofussil of India; they held that the true principle was that stated by Sir Barnes Peacock, *viz.*, that the Courts in India administering justice in accordance to the broad principles of equity and good conscience, will consider whether the transaction is merely the acquisition of an interest in the subject of litigation *bonâ fide* entered into, or whether it is an unfair or illegitimate transaction got up merely for the purpose of spoil or of litigation, and carried on for corrupt or other improper motives.

In the third the ruling was still stronger; there it was distinctly held that delivery was not necessary to complete the title of the vendee; further that this was the general rule in India, and that under the Hindu law a well defined usage acquires the force of law. Considering, therefore, that the latter rulings support the view taken by the Subordinate Judge, we hold that in the present case the plaintiff had a right to bring the suit.

(His Lordship after deciding the remaining issues in the plaintiff's favour dismissed the appeal with costs).

Appeal dismissed.

(1) 13 B. L. R., 509.

(2) 14 B. L. R., 307.

PRIVY COUNCIL.

THE MAYOR OF LYONS (PETITIONER) v. THE ADVOCATE-
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P. C.*
1875
Dec. 1 § 2
§
1876
Feb. 5

[On appeal from the High Court of Judicature at Fort William in Bengal.]

Charitable Gift—Failure of Object—Cyprès Performance.

The doctrine of *cyprès* as applied to charities rests on the view that charity in the abstract is the *substance* of the gift, and the particular disposition merely the *mode*, so that in the eye of the Court, the gift, notwithstanding the particular disposition may not be capable of execution, subsists as a legacy which never fails and cannot lapse.

It cannot be laid down as a general principle that the *cyprès* doctrine is displaced where the residuary bequest is to a charity, or that among charities there is anything analogous to the benefit of survivorship, since cases may easily be supposed where the charitable object of the residuary clause is so limited in its scope, or requires so small an amount to satisfy it, that it would be absurd to allow a large fund bequeathed to a particular charity to fall into it.

On the failure of a specific charitable bequest, jurisdiction arises to act on the *cyprès* doctrine, whether the residue be given in charity or not, unless upon the construction of the will a direction can be implied that the bequest if it fails should go to the residue.

In applying the *cyprès* doctrine, regard may be had to the other objects of the testator's bounty, but primary consideration is to be given to the gift which has failed, and to a search for objects akin to it. The character of a charity as being for the relief of misery in a particular locality may guide the Court in framing a *cyprès* scheme to benefit that locality.

Unless the *cyprès* scheme framed by the lower Court be plainly wrong, a Court of Appeal should not interfere with it.

APPEAL from an order of the High Court at Calcutta (Kemp and Pontifex, JJ.), dated the 10th September 1873, and made in certain causes instituted for the purpose of administering the trusts of the will of General Claude Martin.

General Claude Martin was a Major-General in the service of the Honorable East India Company, and a native of Lyons in

* Present:—SIR J. W. COLVILLE, SIR B. PEACOCK, SIR M. E. SMITH, AND
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France. He died at Lucknow, in the territories of the King of Oude, in the East Indies, on the 30th September 1800, leaving a will bearing date the 1st January of that year, and being then possessed of personal property to a large amount and also of houses and lands in Calcutta and other parts of India.

The said will contained, among others, the following dispositions:—A gift of Rs. 5,000 per annum for the release of prisoners for debt in Calcutta, and a gift of Rs. 1,000 per annum for the relief of such prisoners: a similar gift of Rs. 4,000 per annum for the liberation of poor prisoners in Lyons: a like gift of Rs. 4,000 per annum to liberate prisoners for debt in Lucknow: three bequests to found charities at Calcutta, at Lyons, and at Lucknow, respectively: and a gift of the residue equally between the said three charities. With reference to the gift in favor of the Lucknow prisoners, the will directed that if it should fail the fund should remain to the estate. No similar direction was given in respect of the gifts in behalf of the Calcutta or Lyons prisoners. The articles of the will in which these dispositions are contained are set forth in their Lordships' judgment. The 28th Article contains the bequest for the release and relief of prisoners in Calcutta, in reference to which the question involved in this appeal has arisen.

On the 3rd August 1865 a petition was presented to the High Court by the Advocate-General of Bengal, in which it was stated that the bequest to prisoners in Calcutta had become obsolete, and had not been acted upon for a considerable time by reason of the change in the law relating to imprisonment for debt, and that a fund of Rs. 3,50,000 had accumulated, and a scheme was proposed for the application of such accumulated funds. The scheme was subsequently adopted by the Court, and an order passed confirming it on 2nd March 1866. The order now on appeal was made in a petition from the Mayor of Lyons presented to the High Court on 30th June 1873 which prayed, among other things, for a declaration that the bequest in clause 28 of the will had failed, and that the sums standing to the credit of the accounts for the release and relief of prisoners under the order of 2nd March 1866 fell into and formed part of the residue of the testator's estate.

The petition of the Mayor of Lyons came on to be heard before the High Court, and by the order made on the said petition on the 10th of September 1873, it was among other things ordered that the prayer of the petition of the Mayor of Lyons, so far as it related to the bequest in Article 28 of the will of the said testator, be refused, and it was declared that the charitable gift in the 28th Article of the said will was an absolute charitable gift capable of being applied *cypres*, and that the Mayor of Lyons, as one of the residuary legatees under the said will, was not entitled to any part of the trust funds appropriated to such gift.

The grounds, on which the Judges of the High Court proceeded in passing this order, are thus stated in their judgment:—

“The contention of the Mayor of Lyons before us by his Counsel, Mr. Goodeve, was that under the bequest in Article 28 of the will, the charitable intent of the testator was particular and not general, and that the particular object having failed by the virtual abolition of imprisonment for debt, the subject of the bequest fell into the residue. As authorities for this contention, Mr. Goodeve cited the cases of which *Cherry v. Mott* (1) is the leading authority, and the principle of which cases has lately been approved of by the present Lord Chancellor in the case of *Chamberlayne v. Brockett* (2). But we are of opinion that in the bequest in Article 28, the charitable intent of the testator was general and absolute, and that the specification of imprisonment attached to it and which, from an altered state of circumstances brought about by changes in the law which the testator did not foresee, and by the practical abolition of imprisonment for debt, no longer applies, was merely intended as a convenient badge of description to discover the most necessitous of a large class, *viz.*, the honest poor of Calcutta, but we think such intention cannot fail while that class of objects continues to exist.

We should have been of this opinion even if the case had been untouched by authority, but in fact it is amply covered by authority. There is the well-known case of *The Attorney-General v. The Ironmongers' Company* (3), which was reported in several stages. In that case the charitable gift was for the redemption of Christian captives in Barbary, a gift which wholly failed because, by the events which

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(1) 1 My. & Cr., 123.

(2) L. R., 8 Ch. Ap., 206.

(3) 2 My. & K., 576; 1 Cr. & Ph., 208; 10 Cl. & F., 908.

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had happened since the death of the testator, there were no such captives for whose benefit it could be bestowed, and notwithstanding that it was held that the fund was dedicated generally to charity, and that it could be applied *cyprès*.

Again in the case *Ex parte Governors of Christ's Hospital* (1), the Attorney-General in England had applied to the Court for the settlement of a scheme, with respect to several charitable funds which were vested in the Corporation of London, and thirty-six other sets of trustees being city companies, churchwardens, and overseers of parishes and others, who nearly all appeared and opposed the application. The object of these charities, was the relief of poor prisoners for debt. The charities had been founded at different times in the course of the 17th and 18th centuries with an income amounting in the aggregate to £2670 a-year. At the time the Attorney-General applied to the Court, the funds were either accumulated by the trustees or applied by them to purposes which they considered *cyprès* to the original gifts. In that case Vice-Chancellor Bacon held, and his opinion was confirmed by the Court of Appeal, that the gifts were absolute charitable gift and that they could be applied *cyprès*.

We therefore think that the charitable gift in the 28th Clause of the will was an absolute charitable gift capable of being applied *cyprès*, and consequently that the Mayor of Lyons, as one of the residuary legatees under the will, has no claim whatever to any part of the trust funds appropriated to such gift. But the Mayor of Lyons has further objected that notice of the proceedings of 1865 ought to have been given to him as one of the residuary legatees, to which I am by no means disposed to assent; and it has been argued on his behalf that if notice ought to have been given to him, he is entitled now to reopen the matter and to show that the application of the prisoners' funds authorized by the order of 1866 was not properly *cyprès*. I think it clear that he cannot do so under the present petition, which prays that those funds should be dealt with and divided as residue; nor do I hold out to him any hopes of success if he should apply under a differently framed petition, because it seems to me and also to my learned colleague that if the scheme which was confirmed in March 1866 could by any possibility be reopened at all, the terms on which it would be reopened would be that the application of the whole of these funds should be confined to the city of Calcutta. The gift was for the benefit and for the release from prison of poor debtors in

Calcutta, amongst whom poor officers and other military men were to be preferred; that class of persons still continues to exist, although imprisonment for debt has been virtually done away with; and we are both of opinion that if any alteration could be made in the scheme, no benefit would result to the Mayor of Lyons.

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After reading the remarks of Bacon, V.C., in the case of the *Governors of Christ's Hospital* after it left the Appeal Court and came before him for confirmation of the scheme proposed by the Attorney-General, the learned Judge continued:—"It seems to me that if the scheme of 1866 could possibly be reopened, these observations would be very pertinent, to any other applications of the funds; and, if these observations are pertinent, it is clear that the Mayor of Lyons would have no claim to any portion of the funds which were by the testator dedicated to the honest poor of Calcutta. We, therefore, think that with respect to these funds, the petition of the Mayor of Lyons wholly fails" (1).

Against the order passed by the High Court in so far as it relates to the bequest in Article 28 of the testator's will, the Mayor of Lyons brought the present appeal to Her Majesty in Council.

Mr. Cowie, Q.C., and Mr. Hemming, Q.C., for the appellant:—Where the residuary bequest is to a charity, the doctrine of *cyprès* disposition of charitable legacies is inapplicable. The object of the doctrine is to save for charity what otherwise would be taken from charity: see Jarman on Wills, Vol. I, pp. 223, 224, and see the cases of *Moggridge v. Thackwell* (2), and *Cary v. Abbott* (3). Where the residuary bequest is to a charity, there is no occasion to have recourse to *cyprès*. It cannot be applied to take from a charity contemplated by the testator, and to give to another charity which he did not contemplate. There is no instance of such a case.

The *cyprès* doctrine does not apply in the present case by reason of the special provisions of the will. The broad object of the testator was to found three charitable institutions or Colleges at Lucknow, Calcutta, and Lyons, and to make these

(1) L. R., 16 Eq., 129, see pp. 146, 147, 148, & 149.

(2) 7 Ves., 36, and 13 Ves., 416.

(3) 7 Ves., 490.

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the principal objects of his bounty. The testator did not contemplate the possibility of his bequest in favor of poor debtors in Calcutta failing from default of objects; but had he done so, it may be presumed that he would have provided, as he did in the similar bequest to poor prisoners at Lucknow, that in case of failure the gift should remain to the estate, and go to increase the funds of the three great charities which he had made residuary legatees.

The orders passed by the Courts in dealing with the will in the previous proceedings arising out of it have determined the appellant's right to share in the fund set free by the failure of the bequest to the Calcutta prisoners. This was the effect of the general declaration as to the disposition of the surplus funds among the three colleges, made by the decree of the Supreme Court of the 23rd February 1832, which was not disturbed on appeal, and was afterwards carried out under the decree of the same Court, passed on the 31st August 1840, and the subsequent decree of the 28th February 1849. In the previous appeal by the *Mayor of Lyons v. The East India Company* (1), the Judicial Committee had to consider whether the gift to found the College at Lucknow could be carried into effect, and, if not, what was to be done with the fund left for that purpose. In delivering their Lordships' judgment, Lord Brougham said that on the authority of the cases of *Attorney-General v. Bishop of Llandaff* (2), and *Attorney-General v. The Ironmongers' Company* (3), "it was clear that the other two charities must take if the gift failed as regards the third."

Assuming that a *cyprès* application of this fund is admissible, the actual scheme is an improper one. The bequest was for the relief and release of poor honest debtors. The scheme is in the first place for the relief of criminals on their release from jail. This is not a purpose akin to the intentions of the testator. The scheme then distributes the surplus fund between Calcutta and Lucknow. If Lucknow is to share the gift, there is no reason why Lyons should be excluded.

(1) 1 Moore's I. A., 175, sec. 290.

(2) Not reported.

(3) 2 My. & K., 576.

Mr. *Cotton*, Q.C., and Mr. *E. Macnaghten* for the respondents:—The principle of distribution in the will is to confer two kinds of benefit on each of the three towns, Lucknow, Calcutta and Lyons. Each is to have a school and relief for poor prisoners for debt, and the schools are to be the residuary legatees. The gift to the Calcutta prisoners having failed, the appellant asks that it may be treated as residue, and a share of it given to the school at Lyons. He contends that, where the residuary bequest is to a charity, the doctrine of *cyprès* does not apply, since the only object of *cyprès* is to save for charity what otherwise would be lost to charity. This is an inadequate conception of the principle on which the doctrine of *cyprès* rests. *Cyprès* does not direct a performance in accordance with the general intentions of the testator, but as nearly as possible in conformity with the nature of the particular gift which has been defeated, and it is to be applied whether the residuary is a charity or an ordinary legatee. On the failure of a charitable gift it does not fall into residue unless the will so directs. In the present will there is a provision that on the failure of the gift for relief of the Lucknow prisoners it shall fall into the residue, but there is no similar direction in respect of the similar gifts to Calcutta and Lyons, and no indication of any intention that such should be the case. The principle on which the doctrine of *cyprès* rests is that expressed by Lord Eldon in the cases of *Moggridge v. Thackwell* (1), and *Mills v. Farmer* (2), namely, that where a testator has shown that charity is the substance of his gift, and a particular disposition merely the mode, the failure of the particular mode is not to hinder the substantial gift to charity being carried out: see also *Ex parte Governors of Christ's Hospital* (3). In the present case the testator's plain intention was to give to charity. The case consequently was not governed by the rule laid down in *Cherry v. Mott* (4) and *Chamberlayne v. Brockett* (5), to the effect that where the testator has a particular object in view and not a general charitable

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(1) 7 Ves., 36.

(3) L. R., 8 Chap., 199.

(2) 19 Ves., 482; S. C., 1 Meri.,

(4) 1 My. & Cr., 123.

(5) L. R., 8 Chap., 206.

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intent, the gift, if its objects fail, will not be applied *cyprès*, but will fail altogether.

The appellant's contention that his right to a share in the gift to the Calcutta prisoners had been determined by previous decrees is not supported by the terms of these decrees, which did not, in fact, deal with the matters now in question. The remarks which have been cited from Lord Brougham's judgment in the previous appeal, were not necessary for the decision of the case as it then stood. They express the erroneous view of the doctrine as to *cyprès* which Lord Brougham then entertained, and which he had similarly expressed in the earlier stage of the case of the *Ironmongers' Company v. The Attorney-General* (1). That view was corrected at a later stage of that case (2). The cases of *Fisk v. Attorney-General* (3) and *Re Ashton's Charity* (4) are opposed to the view that *cyprès* will not apply where the residuary bequest is to a charity.

In his petition the appellant claimed as a residuary legatee for a lapsed legacy. Assuming that position he has no *locus standi* to ask for a reform of the *cyprès* scheme approved of by the High Court. It has been laid down in the *Ironmongers' case* that a Court of Appeal ought not readily to interfere with the discretion exercised by the Court below in framing a *cyprès* scheme. In the present case there are reasonable grounds for limiting the benefit of the scheme to India and excluding Lyons.

Mr. Hemming in reply.

Their Lordships took time to consider their judgment which was delivered by

SIR M. E. SMITH.—THE questions in this appeal arise upon one of the bequests in the will of Major-General Claude Martin, whereby he gave the annual sums of 5,000 rupees and 1,000 rupees to be applied respectively to the discharge and relief of poor debtors detained in prison in Calcutta.

(1) 2 My. & K., 576.

(2) 10 Cl. & Fin., 908.

(3) L. R., 4 Eq., 521.

(4) 27 Beav., 115.

The residue of his large property the testator bequeathed, in the special manner more particularly stated hereafter, to increase the funds of certain charitable establishments which, by previous clauses in his will, he had founded in Calcutta, Lucknow, and the City of Lyons, in France. The bequests to poor prisoners in Calcutta having failed by reason of the abolition of imprisonment for debt, the point to be considered is, whether these gifts are to be dealt with by the Court upon the principle of a *cypres* application of them, or whether, as the appellants contend, they fall into the residue, so as to increase the endowments of the three establishments above referred to.

The testator was a Frenchman, born in Lyons. He entered the military service of the East India Company, and attained the rank of Major-General. With the sanction of the British Government he afterwards took service under the Ruler of Oude, and resided at Lucknow, where he died in September 1800. The will, dated the 1st January 1800, was composed and written by the testator himself in English, a language of which, it appears, he had only an imperfect knowledge. It contains numerous bequests, comprised in thirty-four articles or clauses, and has been the subject of many suits and much litigation. Several questions arising upon it, and notably the question whether the English law relating to aliens had been introduced into British India, were determined by this Committee on appeal in 1836. The judgment was delivered by Lord Brougham, and some passages of it will hereafter be referred to. The general history of the suits will be found in Mr. Moore's full report of the case (1).

By the will in question the testator bequeathed his property, which he valued at upwards of thirty lakhs of rupees, partly to individual legatees, and more largely to various charitable objects. The most prominent of the charities were the institutions he founded in Lucknow, Calcutta, and Lyons for educational and other purposes, his desire being to perpetuate his memory in these cities. The purposes are not precisely alike in the three cities, owing to the different conditions of the countries to which they belong. The bequest to Calcutta is found in

(1) *The Mayor of Lyons v. The East India Company*, 1 Moore's I. A., 175.

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the 24th Article of the will; that to the City of Lyons is contained in the 25th Article, and is as follows:—

“I give and bequeath the sum of 200,000 sicca rupees to be deposited in the most secure interest fund in the town of Lyons in France, and the Magistrates of that town to have it managed under their protection and control: that above mentioned sum is to be placed, as I said, in a stock or fund bearing interest, that interest is to serve to establish an institution for the public benefit of that town; and the Academy of Lyons are to devise the best institution that can be permanently supported with the interest accruing of the above named sum; and, if no better, to follow the one devised in the Article 24 as at Lucknow; the institution to bear the name of Martiniere, and to have an inscription made at the house of the institution, mentioning the same title as the one of Calcutta, and this institution to be established at the Place of St. Pierre, St. Safurinn being where I have been christened—there at that place to buy or build a house for that purpose; and to marry two girls every year, to each 200 livres tournois, besides paying about 100 livres for the marriage and feast of each of those who married: or if the institution, such as the Lucknow one, educating a certain number of boys and girls, then they are to have a sermon and a dinner for the school-boys and those that are married, and they are to drink a toast in memory of the institutor; and a medal is to be given of the value of 50 livres, with a premium in cash or in kind, to be about 200 livres, to the boy or girl that has been the most virtuous, and behaved better during the course of the year; and also to have a premium of the value of 100 livres for the second that behave better, and also a third premium of about 60 livres for the third that behave better. I am in hope that the Magistrate of the town will protect the institution; and in case the sum above allowed of 200,000 sicca rupees is not sufficient for a proper interest to support the institution, and buying or building the house, then I give and bequeath an additional sum of 50,000 sicca rupees, making 250,000 sicca rupees. One of my male relations residing at Lyons may be made administrator or executor, joined with any one appointed by the Magistrate to be manager of the said institution; and these managers are to have an economical commission for their trouble, taken from the interest of the sum above mentioned. I also give and bequeath the sum of 4,000 sicca rupees to be paid to the Magistrates of the town of Lyons for to liberate from the prison so many prisoners as it may extend, such that are detained for small debt; and this liberation is to be made the day of

month I died, as that the remembrance of the donor may be known, and my name, Major-General Martin, is the institutor ; and as given and bequeathed the sum of 4,000 sicca rupees for to liberate some poor prisoners as far as that sum can afford it. This I mention to have it made known, as that if neglected, that some charitable men may acquaint the Magistrate of the town of Lyons, as that they might oblige my executor, administrator, or assigns, to pay the same above said, and be more regular in their payments."

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It is to be observed that this 25th Article contains the gift of an annual sum of 4,000 rupees to be paid to the Magistrates of Lyons to liberate poor prisoners detained for debt.

The analogous gift in favor of poor prisoners in Calcutta, which forms the subject of the present appeal, is not in like manner included in Article 24, containing the principal bequest to that city, but is found in a separate article (the 28th), which is as follows :—

"I give and bequeath the sum of 5,000 sicca rupees to be paid annually to the Magistrate, or Supreme Court of Calcutta, or to Government. This sum is to serve to pay the debt of some poor honest debtor detained in jail for small sum, and to pay as many small debt and liberate as many debtor as the sum can extend. This liberation is to be made the day and month I died as a commemoration of the donor ; and as being a soldier, I would wish to prefer liberating any poor officers or other military men detained for small debt preferable to any other. And I also give and bequeath the sum of 1,000 sicca rupees to be paid yearly, and to make a distribution of it to the poor prisoners remaining in jail on the same day as the one mentioned above, both sums making 6,000 rupees every year."

The material part of the 33rd Article, which contains what may be treated as a residuary disposition, is in the following terms :—

"After all accounts being settled, and sum insured for the interest for the payment of the several monthly pensions, and the several payment of gift and others, as also the several establishment, if a surplus above 100,000L. sterling, or about 10 lacs of sicca rupees, remain of my estate, that above surplus of 10 lacs of sicca rupees is to be divided in such a manner as to increase the several establishment of Calcutta, at Lyons, and Lucknow, as that they may be permanent and exist for ever. Besides the sum allowed for finishing all the building, and other

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of Constantia House, which I suppose may amount to 200,000 sicca rupees, I also give and bequeath the sum of 100,000 sicca rupees for the support of the college and other school, to be regulated as the Calcutta establishment, as per Article 24, as also as the establishment at Lyons, Article 25, the gift for the poor of Lucknow, to be conducted as mentioned in Article 23. I also give and bequeath the sum of 4,000 sicca rupees to be paid annually for to liberate as many prisoners for debt at Lucknow as it may extend, and if none, then that sum is to remain to the estate; any sum remaining is to be placed at interest for to accumulate, and improve the several establishment and concern of Indigo."

This article, it may here be remarked, comprises a gift of 4,000 rupees, to be paid annually to liberate poor prisoners for debt at Lucknow, but with a direction, that "if none, that sum is to remain to the estate."

Without going into the details of the suits, it will be convenient to refer generally to the proceedings relating to the fund now in dispute.

It appears that by an order of the Supreme Court of Judicature at Fort William of the 11th November 1802 made in the cause of *Uvedale v. Palmer*, a scheme which had been settled by the Master for the administration of the charities for the release and relief of poor prisoners at Calcutta was confirmed by the Court, and funds to satisfy these charities were, by orders of the Court, transferred to the credit of two accounts entitled respectively, "Distribution of General Claude Martin's Fund for the Release of Prisoners," and "Distribution of General Claude Martin's Fund for the Relief of Prisoners."

The above orders are not found in the Record, but their existence was admitted by the Counsel, and the substance of them is stated in the petition of the Officiating Advocate-General of the 3rd August 1865, and in a previous decree of the 31st August 1840. It also appears that the income of these funds, in excess of what was required for poor prisoners, had accumulated, and at the date of the petition of the Advocate-General above referred to, the fund amounted in the aggregate to about 351,000 rupees. This petition, after stating that for many years past, owing to the passing of laws for the relief of insolvent debtors and other causes, the existing scheme "had

become obsolete," submits that there were useful charitable objects of a kind not very different from those contemplated by the testator, and also charitable objects of other descriptions which the testator approved and made the subjects of other bequests, towards which the income of the funds might now be beneficially applied; and prays to be at liberty to submit a scheme for the application of the funds "in lieu and supersession of the former schemes."

On the 3rd August 1865, an order was made on this petition as prayed. This was done without citing the Mayor of Lyons; and in making it the Court evidently assumed it had power to deal with these funds on what is called the *cyprès* principle.

A scheme was accordingly settled and confirmed by an order of the Court on the 2nd March 1866. This scheme provides, in substance, that a sum of 150,000 rupees, representing an annual income of 6,000 rupees, should be reserved in an account, to be headed, "The Account of General Martin's Fund for the Release and Relief of Prisoners;" the income of which was to be applied by the visiting justices to assist convicts who had conducted themselves properly in prison upon their discharge; and that the corpus of the fund, after reserving the above sum of 150,000 rupees, should be applied as follows, *viz.* : "that one lakh of rupees should be transferred to the credit of the Governors of the Calcutta Branch of La Martinière, and the residue (amounting to nearly a lakh of rupees) after paying the costs of these proceedings, should be transferred to the credit of the Lucknow Branch of La Martinière for the general purposes of these institutions respectively." Some special directions also were given regarding the disposition of the fund transferred to Lucknow.

It will be convenient to mention here what has been done with respect to the charities for the liberation of poor prisoners in Lyons and Lucknow. With respect to Lyons, it was declared by the decree of the 23rd February 1832 (and this declaration was not disturbed on the appeal, in 1836), "that a sum sufficient to satisfy the bequest of 4,000 rupees to be paid annually for the liberation of prisoners at Lyons, together with the accumulation of interest since testator's death had been

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fully paid to the Mayor and Commonalty of Lyons." It appears therefore that this fund, instead of being carried to an account in the causes, as was done with the Calcutta fund, was, before the year 1832, paid over "fully" to the Municipality of Lyons, and that the administration of it has since taken place without any control by the Court.

With respect to Lucknow, the decree of the 23rd February, 1832, declared that it being impossible owing to the form of Government at Lucknow and other causes to give effect to the gift in favour of poor prisoners at that place, the bequest was void. This declaration relating to the gift to poor prisoners of Lucknow was not disturbed on appeal, and the residue was increased by the amount which would have been required to satisfy it. No objection appears to have been made to the Lucknow gift going into the residue; but it is to be remembered that in the clause of the Will relating to this legacy it is expressly directed that in case of failure "the sum is to remain to the estate."

The order of the 2nd March 1866, confirming the scheme for the application of the funds in dispute, appears to have been unquestioned until 1873, when the petition of the Mayor of Lyons, which gives occasion to the present appeal, was filed. The petition (dated 21st June 1873), after stating the facts, and asking relief with respect to other sums which was granted in the Court below, prays that it might be declared that the bequests in the 28th Article of the testator's will had failed, and that the sum standing to the credit of the accounts for the release and relief of prisoners at the date of the order of the 2nd March 1866, fell into and formed part of the residue of the testator's estate. It also prays for relief consequent on this declaration, to the effect that this amount with the accumulations should be ascertained and carried to the general credit of the causes, and divided between the petitioner and the other residuary legatees.

The Judges of the High Court, in a judgment fully stating their reasons, whilst granting relief to the petitioner on other matters, refused this prayer; and inserted in their formal decree a declaration containing the ground of their refusal in these

terms:—" That the charitable gift in the 28th Clause of the will was an absolute charitable gift, capable of being applied *cyprès* ; and that the petitioner, the Mayor of Lyons, as one of the residuary legatees under the will, is not entitled to any of the funds appropriated to that gift."

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It is to be noticed that the only question raised by the petition is, whether the appellant, representing the city of Lyons, is entitled as one of the residuary legatees to a share of these trust funds, as having fallen into the residue. Whether the Martinière establishment of Lyons should have been included in the distribution provided by the scheme ordered by the Court is a different question, which is not raised by the petition.

Three points were made at the bar by the appellant's Counsel.

I. That the doctrine of *cyprès* disposition of charitable legacies is inapplicable where the residuary bequest is to charity.

2. That if this be not true as a general proposition, the doctrine is inapplicable to the particular case, by reason of the special provisions of General Martin's will.

3. That the previous decrees have determined the question in the appellant's favor.

1. The appellant's Counsel did not dispute the general doctrine, and there is no doubt that although strongly disapproved of by Lord Eldon, it was in his time so firmly established, that this great Judge felt himself bound, contrary to his own opinion, to give effect to it. But their broad contention was that there was no room or necessity for the interposition of the Court where the residuary bequest is to charity, and they sought in the reason of the rule the grounds for supporting this distinction. The rule, they said, was founded on the presumption that although the gift might be to a particular charity, the intention was to give to charity generally, and the Court therefore, when the particular disposition could not be carried into effect undertook to make a *cyprès* application of the fund in order that charity should not be disappointed. The reason of the presumption, it was said, being to prevent funds given to charity from falling to residuary legatees or next-of-kin, and so disappointing the general intention of charity, altogether failed,

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and left no foundation for the interposition of the Court where the bequest of the residue itself was to charity. Why, it was asked, should the Court interfere to intercept a fund falling into a residue devoted to charity, substituting its own discretion for the testator's?

The question thus raised does not seem to have been distinctly before the Courts in any of the previous decisions; but their Lordships, after fully considering the argument, are unable to perceive satisfactory grounds for such a limitation of the *cypres* doctrine: certainly not as a limitation applicable generally to all cases in which the residuary bequest is to charity, whatever its kind and nature may be. The principle on which the doctrine rests appears to be, that the Court treats charity in the abstract as the substance of the gift, and the particular disposition as the mode, so that in the eye of the Court, the gift, notwithstanding the particular disposition may not be capable of execution, subsists as a legacy which never fails, and cannot lapse.

This seems to be what Lord Eldon understood to be the effect of the decisions, from the following passage of his judgment in *Mills v. Farmer* (1).

"With regard to charity, therefore, without going through all the cases, which I examined with great diligence in *Moggridge v. Thackwell*, a case that, bound by precedent, I decided as much against my inclination as any act of my judicial life, I consider it now established, that although the mode in which a legacy is to take effect is in many cases with regard to an individual legatee considered as of the substance of the legacy, where a legacy is given so as to denote that charity is the legatee, the Court does not hold that the mode is of the substance of the legacy, but will effectuate the gift to charity, as the substance; providing a mode for *that legatee* to take which is not provided for any other legatee." This passage is reported in somewhat different language, but substantially to the same effect, in 1 Mer., 99.

Nor can the suggested distinction, as a general qualification of the doctrine, be, in reason, maintained. Cases may be easily

(1) As reported in 19 Ves., 486.

supposed where the charitable object of the residuary clause is so limited in its scope, or requires so small an amount to satisfy it, that it would be absurd to allow a large fund bequeathed to a particular charity to fall into it. If a large sum were given to endow a college, and the residue bequeathed for the support of three poor almswomen, or to provide coals at Christmas for ten poor persons, it would be manifestly absurd, supposing the *cyprès* doctrine be established at all, to withhold the application of it in instances of this kind. It cannot, therefore, in their Lordships' opinion, be laid down as a general principle that the *cyprès* doctrine is invariably displaced where the residuary bequest is to charity.

II. But it was next contended that, however this may be, the Court below was wrong in applying the *cyprès* doctrine to the will in question. Undoubtedly the charitable establishments mentioned in the residuary bequest are of a comprehensive character, as well as prominent objects of the testator's bounty; and the argument of the appellant's Counsel on this part of the case was strongly urged and has been carefully considered by their Lordships. The argument on this point really raises two distinct questions; (1) whether the *cyprès* doctrine is excluded; and (2) whether upon the construction of the will there was a bequest over of the legacy, in case of failure of objects, to the Martinière charities.

On the first (in the discussion of which it must, of course, be assumed there was no bequest over, otherwise *cadit questio*) the argument was founded on the presumed intention of the testator to make the Martinière establishments the principal objects of his bounty, and to give them the benefit of all lapsed funds. There is certainly much to favor this presumption; but if it be granted for the sake of the argument that, looking at the whole will, it is probable the testator, supposing he had thought about it at all, would have wished the bequest in question to have gone to increase the funds of these establishments, can this conjecture of intention—and upon the hypothesis that the will does not contain expressly or by implication a bequest over, it can be no more—exclude the operation of the doctrine? It seems to their Lordships that an answer in the

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negative is found in the explanation of the doctrine already given, and that on this point the contention of the Counsel for the respondent is supported both by principle and precedent. It was in effect that the Court, when deciding whether the *cyprès* doctrine applies, looks only to the particular gift, and if it finds charity to be the legatee, sustains the legacy as such, without regarding at this stage of the inquiry (whatever may be proper when a scheme comes to be framed) the rest of the will.

This view of the doctrine appears to have been present to the minds of the learned Lords who took part in the decision of *The Ironmongers' Company v. The Attorney-General* (1), although the discussion in the House of Lords turned wholly on the propriety of the scheme for the distribution of the trust funds; it never having been doubted apparently that the doctrine itself was applicable. In the will in that case the testator had divided the residue of his property between three charities, and the question arose upon a scheme for the appropriation of one of them, *viz.*, the gift for redeeming British slaves in Barbary, which had failed for want of objects. It was held that, in applying the *cyprès* doctrine, the Court was to look primarily to the object of the charity which has failed, and was not bound to apply the funds which were set free in that case to the two other charities mentioned in the residuary clause of the will. The Counsel, in arguing, is reported to have said:—"The proper application of the doctrine of *cyprès* is, that you are to look to the objects of the testator, and to what comes near to those objects." To which Lord Cottenham replied: "No, *cyprès* means as near as possible to the object which has failed." Although this opinion was expressed with reference to a scheme for the distribution of the fund, it is clearly to be inferred that this would have been the consideration by which Lord Cottenham would have been guided in a case where he had to decide whether the doctrine applied at all. And upon fully considering the operation as well as the principle of the rule, it is difficult to see that it could be otherwise. Their Lordships, therefore, are brought to the conclusion that the jurisdiction of the Court to act on the *cyprès* doctrine upon the

(1) 10 Cl. & Fin., 908.

failure of a specific charitable bequest arises whether the residue be given to charity or not, unless upon the construction of the will a direction can be implied that the bequest, if it fails, should go to the residue.

The question remains whether such an implication arises upon this will. It certainly cannot be inferred from the terms in which the respective gifts to poor prisoners in Calcutta and Lyons are bequeathed, that the testator had contemplated the failure of either of these charities, or had formed any intention in that case regarding them; on the contrary, the inference arises, upon comparing these clauses with the corresponding gift for the benefit of prisoners at Lucknow in which there is a direction that in the event of failure it shall remain to the estate, that he had not. If, then, an implication can be made, it must be from the residuary clause itself, construed with the other parts of the will relating to the Martinière establishments. The frame of this clause is peculiar: "after the several payment of gift and others, as also the several establishment—if a surplus above ten lakhs remain, that above surplus is to be divided in such a manner as to increase the three establishments." Assuming this to be a residuary disposition into which, in case of failure, legacies other than to charity would fall, yet, in considering the present question, the peculiar frame and language of it cannot be disregarded, and from these it may be inferred that what was present to the testator's mind, and what alone he intended to dispose of, was a residue after the funds for these charities had been provided and set apart. It seems, therefore, to their Lordships, that there is not such a necessary inference of intention to be found in the terms and provisions of the will as is required to raise the implication of a bequest over by the testator of these legacies, upon the failure of the particular charities.

III. The third point argued at the bar was that the decrees already passed are judgments in his favor on the questions above discussed. What the Counsel mainly relied on was a general declaration as to the surplus funds contained in the decree of the 23rd February 1832, which was left undisturbed on appeal, and a disposition by a later decree of the 31st August 1840, of

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part of such surplus funds among the three Martinière establishments.

It is to be observed that the judgment of the High Court does not notice this point, nor does it appear to have been insisted on below. But however this may have been, their Lordships cannot find anything in the decrees referred to which decides the question. The declaration in the decree of 1832 was to the effect that after setting aside sufficient funds for the various charitable and other purposes of the will, the surplus, if amounting to ten lakhs, should be at once divided between the three establishments, and if it fell short of ten lakhs, should accumulate until it amounted to that sum, and be then divided. This is no more than an exposition of the will with regard to the surplus, after provision had been made for the particular gifts. The Court did not then contemplate the failure of the gift in question, and could not have intended to make any declaration regarding it. The disposition referred to in the later decree of 1840 was only a distribution of part of the surplus on the footing of the declaration in the decree of 1832.

Reliance was placed by the appellant's Counsel on some observations in the judgment of this tribunal, delivered by Lord Brougham, in the former appeal. A question had arisen whether the gift to found the establishment at Lucknow could in the circumstances of the country, be carried into effect. The decree below, founded on reports of the master, declared the inability of the Court to give effect to that bequest, but the Court considering that the Governor-General had the means of doing so, had ordered the funds to be paid to the Government for that purpose. This tribunal held that this part of the decree was not warranted by the Master's Reports, and directed a further reference upon the facts. In stating the questions which arose, Lord Brougham made the observations relied on (1):—"Can the decree as to the application of the fund stand?—Shall the fund be applied to the establishment and support of a college at Lucknow?—Shall it sink into the residue and be divided between the two charities appointed to be established at Calcutta and at Lyons?—for the cases of *Attorney-General v.*

(1) 1 Moore's I. A., 290.

Bishop of Llandaff (1) and *Attorney-General v. The Ironmongers' Company* (2), make it clear that in this case, which is indeed stronger than either of those, the other two charities must take if the gift fails as regards the third." It is obvious that the question of the ultimate disposition of the fund was not ripe for decision, the point then under consideration being the directions proper to be given for carrying into effect, if possible, the Lucknow Charity; and, indeed, the decree advised by this Committee, giving directions for that object, was expressly made "without prejudice to any question as to the final application of the same fund under the directions hereinafter contained or otherwise." The observations in the judgment, therefore, can only be regarded as an opinion, and not as a judgment. So regarded, however, they would have been entitled to great weight, if their authority had remained unimpeached. But the subsequent decision in the case of the *Attorney-General v. The Ironmongers' Company* (3) in the House of Lords, in which Lord Brougham concurred, corrected the views his Lordship had expressed in an earlier stage of that case, and in the observations referred to. That decision was in effect that among charities there was nothing analogous to benefit of survivorship.

It was lastly submitted by the appellant's Counsel, that if a *cypres* application was admissible, the actual scheme which excluded the Lyons Charity from participation in the fund is an improper one. The High Court held, and, as their Lordships think, rightly, that it was not competent for the appellants, under their present petition, which is confined to the claim of a share of the residue, as residuary legatees, to open the scheme. But with a view to prevent further litigation and expense, the Judges expressed an opinion that if it was proper to reform the scheme at all, it might be right to confine it to charitable objects in the city of Calcutta, excluding both Lucknow and Lyons. Their Lordships have been invited to correct this view, and to declare that the Lyons Charity ought not to be excluded.

Agreeing with what was said in the House of Lords, in the case

(1) Not reported.

(2) 2 My. & K., 576.

(3) 10 Cl. & Fin., 908.

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of *The Ironmongers' Company* (1), as to the care and circumspection to be exercised by a Court of Appeal in substituting its discretion for that of the Court below, their Lordships would be reluctant in any case to interfere with a scheme unless it were plainly wrong, and still more to unsettle, by a premature declaration, one which is not regularly before them. Besides, bearing in mind the opinions expressed in the House of Lords, so often referred to, they are not satisfied, as at present advised, that the view of the High Court does not accord with them. The sum of these opinions appears to be, that whilst regard may be had to the other objects of the testator's bounty in constructing a scheme, primary consideration is to be given to the gift which has failed, and to a search for objects akin to it. If this be the rule, may not the gift to poor prisoners in Calcutta be considered to have a local character; and in that case, may not a scheme properly framed for the benefit of other poor persons in Calcutta be supported, as being *cyprès* to the original purpose. And if these questions are capable of being answered in the affirmative, it follows that it would not be a valid objection to the present scheme that it gives no part of the funds to Lyons. The contention upon this point, then, appears to come to this, that the inclination of the testator to benefit the Martinière institutions so strongly appears, that it ought to guide the Court in framing a scheme, in preference to the principle of selecting an object near to that which has failed. Opinions may well differ on such a point. Reasons are not wanting in favor of the appellant's contention; but, on the other hand, much may be said in favor of the view that these gifts to poor prisoners bear the character of a charity for the relief of misery in the particular locality. The necessary funds for them were directed by the will to be set apart, and in the case of the Lyons Charity were, long ago, paid over to the municipal authorities of that city. It may well be doubted whether if such a contingency as the failure of the gift to Lyons should occur, it would be thought proper that any part of the funds paid over to the authorities there should be restored to India.

Their Lordships are not now called upon to decide whether

(1) 10 Cl. & Fin., 908.

the application of the gift which has failed to the relief of criminal prisoners, and the transfer of part of it to Lucknow, are proper, or the best possible disposition of the fund. All they need say about the actual scheme is, that they do not feel justified upon the present appeal in declaring, as they are invited to do, that it is necessarily bad, because no part of the fund has been appropriated to the Lyons Charity.

In the result, their Lordships will humbly advise Her Majesty to affirm the decree of the High Court, and to dismiss this appeal with costs.

Appeal dismissed.

Agents for the appellant: Messrs. *Young, Jackson and Co.*

Agents for the respondents: Messrs. *Lawford and Waterhouse.*

APPELLATE CIVIL.

Before Mr. Justice L. S. Jackson and Mr. Justice McDonell.

KHAJAH ASHANOULLAH (ONE OF THE DEFENDANTS) v. RAMDHONE
BHUTTACHARJEE (PLAINTIFF).*

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March 31.

Limitation—Beng. Act VIII of 1869, s. 27—Suit for Possession with Mesne Profits—Defendants—Title.

A suit for possession of certain lands “by establishing the plaintiff’s howla right,” and for mesne profits, brought against a shareholder of the talook in which the lands are situated, a former talookdar, and certain ryots who paid rent to the first defendant, is not a suit to recover the occupancy of the land from which the plaintiff has been illegally ejected by the person entitled to receive the rent, within the meaning of s. 27 of Beng. Act VIII of 1869, and is not governed by the limitation provided by that section.

SUIT for possession of certain lands “by establishing the plaintiff’s howla right,” and for mesne profits. The defendants were the auction-purchaser of a share of the talook wherein

* Special Appeal, No. 1163 of 1875, against a decree of the Second Subordinate Judge of Zillah Backergunge, dated the 5th of April 1875, affirming a decree of the Additional Munsif of that district, dated the 19th of September 1873.

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the lands were situated, the late talookdars, and certain ryots who, the plaintiff alleged, had joined in ousting him from possession by paying rent to the first defendant.

Both the lower Courts having decided the suit in the plaintiff's favor, the first defendant appealed to the High Court, on the ground, amongst others, that the suit ought to have been dismissed under s. 27 of Beng. Act VIII of 1869, inasmuch as it had been instituted more than a year after the date of dispossession.

Baboo *Chunder Madhub Ghose* (with him Baboo *Lall Mohun Dass*), for the appellant, contended, that the suit was practically a suit against the landlord; that the second defendant had in fact acted as a servant of the first defendant; and that the joinder of the ryots made no difference, since the suit was to recover possession, and was not a suit for rent; and that, therefore, the provisions of s. 27 of Beng. Act VIII of 1869 were applicable.

Baboo *Hurry Mohun Chuckerbutty*, for the respondent, contended that the section cited did not apply to the present suit, because the first defendant was only one of several shareholders and not a person solely entitled to receive the rent; secondly because the plaintiff also claimed mesne profits, and lastly because the tenants were joined as defendants—*Mugnee Roy v. Lalla Khoonee Lall* (1). The corresponding section of Act X of 1859 (s. 23, cl. 6) has been held to be inapplicable to suits in which the plaintiff sets out his title, and seeks to have his right declared and possession given him in pursuance of that title—*Gooroodoss Roy v. Ramnarain Mitter* (2) and *Baboo Lalljee Sahoo v. Baboo Bhugwan Doss* (3).

Baboo *Chunder Madhub Ghose* in reply.

The judgment of the Court was delivered by

JACKSON, J.—It appears to us that this is not a suit to which the provisions of s. 27 of Beng. Act VIII of 1869 could be applied for the purpose of barring the suit as not brought within one year. Whatever other difficulties that section may present

(1) 6 W. R., Act X Rul., 19.

(2) B. L. R., Sup. Vol., 628.

(3) 8 W. R., 337.

in regard to suits differing from the present one, we think there are many circumstances which prevent the application of it here. In the first place, it is not simply a suit to recover the occupancy of land from which the plaintiff has been dispossessed by the person entitled to recover the rent. There is a certain complication in the facts alleged, because the plaintiff claims a howla right of which the principal defendant altogether denies the existence. He sues Khajah Ashanoollah, who is not the sole zemindar, but one of the persons entitled to the rent. He sues also Ram Coomar Sen, the previous talookdar of this estate, and he also sues the several persons who are now paying rent to Khajah Ashanoollah. The case is not therefore merely whether the plaintiff has been unduly ejected from a subsisting tenure, but whether the Courts will find and establish by their adjudication a howla right which the plaintiff asserts and the defendant denies. The plaintiff also seeks to recover wasilat. Taking all these circumstances together, it appears to us that this is not a suit of the simple nature referred to in s. 27, and that clearly limitation would not apply. But beyond that it may be observed that this question is now raised for the first time in special appeal. The only kind of limitation set up by the present special appellant in his answer to the suit was that of twelve years. He denied that the plaintiff had been in possession of the land in any shape within twelve years previous to the suit. That allegation has been disallowed by both the Courts. I may observe that the defendant's written statement in this suit has been verified by his mookhtear. No doubt, there are certain kinds of cases in which an extensive landholder may be allowed to make the verification by his local agent, but there are many allegations in this case which the defendant ought to have personally admitted by signing the verification himself, and I do not think that the Court should, in the exercise of its discretion, allow written statements such as the present one to be verified by the mookhtear. For all these reasons, we think that the plea now set up must fail, and as there is no other point relied upon, this appeal must be dismissed with costs.

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Appeal dismissed.

ORIGINAL CIVIL.

Before Mr. Justice Pontifex.

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May 22.

NOCOOR CHUNDER POSE *v.* KALLY COOMAR GHOSE.

Limitation—Act IX of 1871, Sch. II, No. 72—Promissory Note payable on Demand.

The defendant gave the plaintiff a promissory note on the 5th August 1869, payable on demand with interest at 5 per cent. per annum. No sum either in respect of principal or interest was paid on the note, and payment was demanded for the first time in November 1875. Act XIV of 1859 contains no provision as to the date of the accrual of the cause of action in a suit on a promissory note payable on demand, but Act IX of 1871, which repeals Act XIV of 1859, and which applies to suits brought after the 1st April 1873, provides that the cause of action in such a suit shall be taken to arise on the date of the demand. In a suit brought on the note after the demand, *held* that the cause of action arose at the date of the note, and as a suit on it would have been barred under Act XIV of 1859 if brought before the 1st April 1873, the subsequent repeal of that Act would not revive the plaintiff's right to sue.

SUIT on a promissory note, payable on demand, dated the 5th August 1869, for Rs. 5,603 with interest at the rate of 5 per cent. per annum.

The plaint stated that the plaintiff for the first time demanded payment of the note on the 14th November 1875, and submitted that his cause of action arose at that date, and therefore the suit was not barred by limitation. It was admitted by the plaintiff that no payment, either in respect of principal or interest, had been made on the note. The defendant filed a written statement, in which he submitted that the suit was barred by limitation, but he did not appear at the hearing of the suit.

Mr. *Bonnerjee*, for the plaintiff, contended that the suit was not barred: it was brought after the 1st April 1873, and therefore Act IX of 1871 would apply. By No. 72 of Schedule II of that Act, the cause of action on a promissory note payable on

demand, would arise on the demand being made, and that having occurred within three years, the suit is not barred.

Even under Act XIV of 1859, which was repealed by Act IX of 1871, the suit would not have been barred: it is submitted a demand would have been necessary, and that limitation would not begin to run until such demand had been made. Act XIV of 1859 contains no provision as to the date of the arising of the cause of action on a promissory note payable on demand. There are conflicting cases on the point. In *Parbati Charan Mookerjee v. Ramnarayan Matilal* (1), it was held that where it was agreed that a sum of money should be repaid on demand, and that a monthly sum should be paid on it in the meantime, the cause of action arose from the date of the agreement to repay and not from the date of the demand; but in a subsequent and similar case—*Brammamayi Dasi v. Abhai Charan Chowdry* (2)—it was held that the cause of action arose from the date of the demand. [PONTIFEX, J.—Is there not a decision that if the suit were barred under Act XIV of 1859, the subsequent repeal of the Act would not revive it.] Yes, the case of *Thakoor Kapilnauth Sahai Deo v. Government* (3) is on that point in favor of the defendant, see p. 460.

PONTIFEX, J. (after shortly stating the facts as above, continued):—I was referred to two cases said to be conflicting with one another. One *Parbati Charan Mookerjee v. Ramnarayan Matilal* (1) decided by Macpherson, J., and the other *Brammamayi Dasi v. Abhai Charan Chowdry* (2) decided by Norman and Phear, JJ. In each of these cases interest had been paid up to within a short time of the date of suit. And in the second case, Phear, J., expressly held that limitation did not apply, however interest had been paid. “As long,” he said, “as the plaintiff forebore to make demand of the principal, and the defendant at the stipulated periods paid the monthly sums by way of interest, so long it was, as it seems to me, impossible in reason to say that the plaintiff had any cause of suit.” In my opinion, both of the cases cited are adverse to the plaintiff’s claim, and if additional authority was necessary, I might refer

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(1) 5 B. L. R., 396.

(2) 7 B. L. R., 489.

(3) 13 B. L. R., 445.

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to the case of *Hempammal v. Hanuman* (1). In the present case neither principal nor interest has been paid since the 5th of August 1869, and if the plaintiff had instituted his suit on the 6th of August 1872, it must have been dismissed as barred by limitation.

It is impossible for me to hold that he is not barred now because he has deferred the institution of his suit until after the first day of April 1873, the date mentioned in s. 1 of the Limitation Act of 1871 (2).

I must, therefore, dismiss the plaintiff's suit, but, as the defendant does not appear, without costs.

Suit dismissed.

Attorney for the plaintiff: Baboo *Kallynath Mitter*.

Attorney for the defendant: Baboo *Troylucknath Roy*.

PRIVY COUNCIL.

P. C.*
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Feb'y. 1, 2,
 3, § 4.

MOUNG SHOAY ATT (DEFENDANT) v. KO BYAW (PLAINTIFF).

[On appeal from the Special Court of British Burma.]

Duress—Imprisonment—Avoidance of Contract.

An agent employed by the plaintiff to purchase timber for him in the Siamese territory was imprisoned by an officer of the Siamese Government, on a charge brought against him by the defendant of stealing timber. In order to obtain his release he contracted to purchase from the defendant, for the plaintiff, the timber which he was charged with stealing, at a price much beyond its value. *Held*, that the plaintiff might repudiate the contract as obtained under duress.

(1) 2 Mad. H. C. Rep. 472.

(2) See *Venkatashella Mudali v. Manche Reddy*, *Id.*, 298; and *Chinna-Sashagherry Rau*, 7 Mad. H. C., *sami Iyengar v. Gopalacharry*, *Id.*, 283; *Molakatella Naganna v. Pedda* 392; but see *Madharbhui Shioo-Narappa*, *Id.*, 288; *Venkataramanier v. bhai v. Fottesang Nathubhai*, 10 Bom. H. C., 487.

*Present:—SIR J. W. COLVILLE, SIR B. PEACOCK, SIR M. E. SMITH AND
 SIR R. P. COLLIER.

In England the mere fact of imprisonment is not deemed sufficient to avoid an agreement made by one who is in lawful custody under the regular process of a Court of competent jurisdiction, where no undue advantage is taken of the situation of the party making the agreement. But in a country in which there is no settled system of law or procedure, and where the Judge is invested with arbitrary powers, imprisonment may in itself amount to duress such as will avoid a contract entered into by the prisoner with the view of obtaining release.

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APPEAL from a decree of the Special Court of British Burma, dated 3rd of June 1874, reversing a decree of the Judge of Moulmein, dated 21st April 1874.

The suit was instituted to recover Rs. 28,603 damages from the defendant, for wrongfully causing the agent of the plaintiff, one Nga Douk, whilst under restraint, to enter on behalf of the plaintiff into a contract, by which the plaintiff sustained considerable loss. By the contract in question, Douk was to buy from the defendant 152 logs of timber at a very high price, and to give up to him some elephants and harness belonging to the plaintiff, a sum of Rs. 3,000 deposited by the plaintiff with a binyakin (an officer of the Siamese Government), who was alleged to be acting in the matter in collusion with the defendant, as payment of timber-duty, and a sum of Rs. 4,700, which the plaintiff had advanced to certain foresters for timber which he was unable to utilize through being deprived of his elephants. The plaintiff claimed these two sums, with interest at 5 per cent. per annum, for fifteen months; he also claimed Rs. 6,128 for the elephants and harness, and Rs. 9,000 as hire for the elephants for fifteen months, at Rs. 150 each per month. In the Court of the Judge of Moulmein, the suit was dismissed with costs; but this decree was reversed on appeal by the Special Court of British Burma, on the ground that the contract was void as having been made under duress; and a decree was given for Rs. 3,080 for the elephants and harness, for the sum of Rs. 3,000 deposited with the binyakin with the interest claimed, and for the use of four elephants for the time stated at Rs. 140 per month. The claim of Rs. 4,700 was disallowed, as being, even if proved to have been advanced, too remote to be recovered in this suit. From that decree, the defendant appealed to Her Majesty in Council.

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Mr. *Leith*, Q.C., and Mr. *Doyne* for the appellant.

Mr. *Cave*, Q.C., and Mr. *Coryton* for the respondent.

The judgment of their Lordships was delivered by

SIR M. E. SMITH.—This is an appeal from a decree of the Special Court of British Burma, reversing a decree of the Judge of Moulmein, which had dismissed the plaintiff's suit, and giving instead of that decree a judgment for the plaintiff for the sum of Rs. 8,480, with interest.

The plaintiff and defendant are merchants in the timber trade, residing at Moulmein, in British Burma, and it is their practice to go up into the Siamese territory, and under permission from the Government to cut timber there, and bring it down in a manner which has been described by Mr. Coryton, to Moulmein. The plaintiff, at the time when the transactions which gave occasion to these proceedings took place, did not go into the Siamese territory himself, but employed an agent called Douk to purchase timber for him, and entrusted him with a considerable sum of money, and with elephants used in drawing the timber which has been cut. It seems that Douk, on the 20th September 1870, entered into an agreement with a man called Pho to purchase some timber, 200 logs, if Pho could obtain a permit. It will be necessary, hereafter, to consider that agreement more in detail; it is sufficient now to state the fact that such an agreement was made, and the general purport of it. A few months afterwards, on the 3rd of January in the following year 1871, the defendant, who was personally on the spot, also entered into an agreement with the same man Pho, to cut timber for him, under a permit which the defendant had obtained from the Siamese authorities. The defendant entered into agreements with two other foresters of a similar kind. Timber was cut by Pho and by the two other foresters, and on the 6th May, Douk, the plaintiff's agent, went to the two creeks which seem to be called Whaypoogan and Whaykoonpai, where the timber was stacked, and put his mark upon 152 logs. It appears upon the evidence, that at that time there were no marks

upon the timber, except those of the foresters who had cut it. It seems that Pho had cut 81 of these logs, and the two other men had cut 71 logs. The defendant hearing of this proceeding, complained to a Siamese officer, styled binyakin, who was said to be a Judge of the district, of what Douk had done, and the Judge sent a peon with the defendant to arrest Douk, and to bring him before him. It seems that after searching for Douk for two or three days, he was found, and taken into custody, considerable violence being used. How far some violence was necessary to secure him, or what degree of force might reasonably have been employed for that purpose, does not appear, but certainly it would seem that a great deal of violence was used; that he was beaten, tied with a rope, and in this state carried into the presence of the binyakin. When there the binyakin put Douk into irons, with an iron collar round his neck, and it is said that threats of personal violence were used towards him, unchecked by the binyakin. There is probably some exaggeration in the evidence upon that point. But enough remains to show that he was not only placed in imprisonment, but had these irons put upon him, and an iron collar. Under these circumstances he was charged with having put his mark upon the logs, and he was charged with having so done fraudulently and criminally. That being the state of affairs, and Douk being evidently under great apprehension at the time as to what further might happen, it was proposed that he, having put his mark upon the timber, should purchase it; then there was a parley as to the price, and ultimately it was stated that the price he must give for this timber should be 45 rupees a log, a price certainly much larger than the value of the timber as it then lay. It is said to be the law of Siam that a man who has improperly put his mark upon timber which does not belong to him is liable to pay the value of 10 logs for every log so marked. That law or custom is by no means clearly proved, but whether it be so or not, it is clear that the agreement for the purchase of the logs by Douk was at a price considerably beyond their value.

It has been argued on the part of the appellant that although Douk must be considered as a prisoner at the time before this Judge, yet his imprisonment was lawful, and therefore that the

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contract cannot be avoided on the ground that he was under illegal constraint at the time he made it. The Judge of Moulmein is right in his view of the law of England, that in this country if a man is under lawful imprisonment for a civil debt, an agreement which he makes while subject to that constraint is not, by reason of his being so subject to it, capable of being avoided, provided that it is not unconscionable. But imprisonment in a country where there is no settled system of law or procedure, and where the Judge is invested with arbitrary powers, is duress of a wholly different kind. In the one case the prisoner knows that the length and severity of his imprisonment are defined and limited by the law, and cannot be exceeded; whereas in the other the prisoner neither knows what will be the length of his imprisonment, nor what amount of pain and misery he may be put to; all is indefinite; and therefore the apprehension acting on the mind of a man in such a situation would be infinitely greater than if he were imprisoned in a country like England, where the law is settled, and cannot be exceeded by the Judge.

With regard to the actual circumstances of this imprisonment, there was a great deal of violence used at the time of the arrest, and whether some violence was justified or not by Douk's resistance, it is unquestionable that he received a severe beating, which would affect the state of his mind. Then he was put into irons. The charge is made against him—not that he had unintentionally put his mark upon the property of another—but that he had done so criminally, with a view to steal it. He knew what had happened and might happen again in the Siamese territory,—that a wrongful act of that kind might be very severely punished, and to an extent which in this country might be supposed to be disproportionate to the offence.

No doubt, speaking generally, all matters relating to a contract are to be decided by the law of the country where the contract is made, but there are principles of universal application by which all contracts, wherever made, must be judged. The first principle of contract is, that there should be voluntary consent to it. In this country duress has always been held to avoid a contract, except in certain cases where the imprisonment

is lawful. But this exception would not be held to apply to a case where a man is in custody upon a criminal charge like the present, and has made an agreement to give a benefit to another to release him from that charge; in fact such a contract in this country would be held to be void on other grounds. Upon the face of it, this contract shows that the man was charged with a criminal offence. "Treephaw"—that is Douk—"requests not to raise contention against me with regard to having stolen, impressed, and struck with hammer mark the 152 logs of teak timber which has been cut, worked, and kept at the place allotted by Moung Shoay Att in the forest, for which Moung Shoay Att obtained the Imperial order and written permit." It was to get rid of that charge of having stolen these logs, when he was in custody under the circumstances which have been referred to, that this agreement was made. Their Lordships therefore think that the plaintiff may repudiate it, as having been made by his agent when under duress.

It is to be observed that the treaty between the British Government and the Siamese Government contains this clause: "With reference to the punishment of offences or the settlement of disputes, it is agreed that all criminal cases in which both parties are British subjects, or in which the defendant is a British subject, shall be tried and determined by the British Consul." It seems, therefore, that the binyakin had no jurisdiction to try the offence, and the proceedings bear the character of an attempt, by bringing Douk before this Judge, to extort an agreement from him.

Their Lordships for these reasons think that this agreement does not in any way bind the plaintiff; and inasmuch as Rs. 3,000 of his money was paid, and his elephants were delivered under it, that he is entitled to bring this suit.

A question was raised whether the agreement had not been confirmed and ratified by the subsequent acts of the plaintiff, or Douk as his agent. No doubt, if there had been a clear ratification, it being in the power of the plaintiff to ratify or reject it, if there were circumstances from which a ratification might properly be presumed, he would be bound by it, but their Lordships do not find any evidence of such a ratification. The

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delivery of the elephants was in effect made before the constraint or the apprehension of constraint had disappeared; for simultaneously with entering into this agreement, it appears that Douk gave an order to the man who had the custody of the elephants, to give them up to the defendant, and although the actual delivery did not take place immediately, it was made in consequence of that order, and Douk says he was in such a state of apprehension that he could do nothing afterwards, and as soon as he recovered from his beating, went down to Moulmein. The other point is that the timber was accepted by the plaintiff. But their Lordships think that it was not accepted under such circumstances as constitute a ratification, because, all the way through, Douk was protesting against this agreement, and so was the plaintiff, claiming the timber as his own property.

Another ground suggested by the Special Court on which this agreement could not be sustained as against the plaintiff, seems to their Lordships to be well founded. Douk being in custody upon a criminal charge had clearly no authority to part with his employer's property, or to make an agreement to part with it, to relieve himself from such a charge. If there had been any question of a civil nature, it might have been within the scope of his authority, as a general agent, to compromise such a claim, but when charged with personal misconduct and a crime, which it cannot be assumed that his principal had authorized, no authority from the employer can be implied that his money and his elephants should be handed over to the man making the charge, in order to relieve his agent from it. It is sufficient, however, to decide that the agreement is avoided on the ground of duress, for, as the lower Appellate Court observes, this last ground for impeaching the agreement was not made in the pleadings.

Their Lordships having come to this conclusion upon the agreement, it follows that the decree in favor of the plaintiff must stand.

Then the question arises whether a deduction should not be made from the amount of the decree for the value of the timber, which their Lordships are satisfied the plaintiff got into his

possession. Undoubtedly if the timber belonged to the plaintiff, and the claim made by the defendant upon it was an invalid one, no deduction ought to be made from the damages, although possession of it may have been obtained in consequence of this agreement. This raises the question to whom the timber belonged at the time when this agreement was made up on the 10th May. (His Lordship, after going through the evidence on this point and finding it in favor of the defendant, continued :) Their Lordships are therefore of opinion that the total amount decreed and payable to the plaintiff under the decree appealed from should be reduced by the sum of Rs. 3,040, being the value of the 152 logs of timber at Rs. 20 per log. The amount so reduced will be payable to the plaintiff with interest thereon at 5 per cent. from the date of the said decree to the date of realization.

Their Lordships will humbly advise Her Majesty that the decree be varied by making the reduction in these terms, and that in other respects it be affirmed. The decree being thus varied, their Lordships think there should be no costs of this appeal.

Decree varied.

Agent for the appellant:—Mr. *W. D. H. Oehme*.

Agents for the respondent:—Messrs. *Watkins and Lattey*.

ORIGINAL CIVIL.

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Pontifex.

BHUGGOBUTTY DOSSEE (PLAINTIFF) v. SHAMACHURN BOSE
AND OTHERS (DEFENDANTS).

Mortgage—Lien of Mortgage on Sale of Right, Title, and Interest of Mortgage—Writ of fi. fa.—Purchaser at Sheriff's sale at instance of Mortgagee.

N, M and G borrowed from *B* a sum of Rs. 12,000, to secure repayment of which they executed in her favor a joint and several bond in May 1863 for payment of the said sum with interest on the 6th of May 1864, and also a warrant to confess judgment on the bond. On the 27th of April 1864, *N, M*

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and *G* executed a mortgage, in the English form, of certain property to *B*, purporting to do so in pursuance of an agreement alleged to have been entered into between them and *B* at the time the money was advanced by *B* in 1863; but the evidence was not sufficient to show that such agreement had been entered into. Under a writ of *fi. fa.*, issued previously to the mortgage of 1864, *viz.*, on the 23rd of March 1864, in a suit against *M* and *N*, the Sheriff sold to *A*, on the 7th July 1864, the right, title and interest of *M* and *N* in the mortgaged property. Assuming that an agreement to mortgage had been entered into in 1863, *A* had no notice of such agreement. After this a writ of *fi. fa.* was issued by the Sheriff, at the instance of *B*, in execution of a decree which *B* had caused to be entered upon the bond of May 1863; and under that writ the Sheriff, on the 22nd February 1866, sold the right, title and interest of *N*, *M* and *G* in the mortgaged property, and *A* became the purchaser. The purchase-money at this sale was paid to *B*, and *A* entered into possession of the property.

In a suit by *B* against *A* and others on the mortgage of the 27th of April 1864, for foreclosure or sale of the property, the Court below (PHEAR, J.) held:—

that the *fi. fa.*, issued on the 23rd of March 1864, previously to the mortgage, must be taken to have operated against the share of *M* and *N* from the date when it was issued;

that even if there was an agreement to mortgage, as alleged, then, although as against *N*, *M* and *G* themselves, a Court of Equity would treat such agreement as equivalent to an actual mortgage, yet it would not do so as against a purchaser under the *fi. fa.* without notice; and

that the sale of the 7th July 1864, therefore, passed the shares of *M* and *N* to *A* free of any rights or equities of *B*.

● Further, that the sale by the Sheriff, of the 22nd February 1866, having been effected at the instance of *B*, for the purpose of realizing the mortgage-debt, was operative, as between *B* and *A*, to pass to *A* the entire shares of *N*, *M* and *G* in the property free of *B*'s mortgage lien.

Held on appeal, that no agreement to mortgage being established, the sale by the Sheriff to *A* in 1864 overrode the mortgage to *B*, and passed to *A* the shares of *M* and *N*.

Held further, that the sale by the Sheriff in 1866 being of the right, title and interest of *N*, *M* and *G*, and made at the instance of *B*, without notice of her mortgage, and *B* having received the purchase-money, which would appear to have been estimated on the value of the unencumbered shares, and no objection having been made to the sale by the mortgagors, who had allowed *A* to hold unchallenged possession ever since, the entire equitable estate in the share of *G* must be taken to have passed to *A*.

A mortgagee is not entitled, by means of a money-decree obtained on a collateral security, such as a bond or covenant, to obtain a sale of the equity of redemption separately. To allow him to do so would deprive the

mortgagor of a privilege which is an equitable incident of the contract of mortgage,—namely, a fair allowance of time to enable him to redeem the property (1).

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APPEAL from a decision of Phear, J., dated 26th July 1875.

This was a suit on a mortgage, dated 27th April 1864, for foreclosure or sale of 28-48ths of a house and land in Calcutta; but the case is worth reporting only in so far as it relates to 14 out of these 28 shares.

In the plaint and written statement of the plaintiff, it was alleged that Nobinchunder, Muttylall and Gopalchunder, the owners of these 14 shares, borrowed from the plaintiff Rs. 12,000 on 9th May 1863, and to secure repayment thereof executed in her favor a joint and several bond for payment of the said sum with interest on the 6th May 1864, and also a warrant to confess judgment thereon, and agreed to execute the mortgage now sued on by way of further security for the loan; that on 27th April 1864 the mortgage now in suit was, in pursuance of the aforesaid agreement, executed by Nobinchunder, Muttylall, and Gopalchunder in favor of the plaintiff; that the money advanced on the bond and mortgage formed a portion of the estate of the plaintiff's deceased husband Baneymadhub Mitter, of which the Court Receiver had been appointed Receiver, and on default being made in payment of the sums secured by the bond and mortgage, the Receiver in the name of the plaintiff obtained a writ of *fi. fa.*, in pursuance of which the Sheriff seized the right, title and interest of Nobinchunder, Muttylall and Gopalchunder in the mortgaged premises, and sold the same on the 22nd February 1866 for Rs. 3,700 to the defendant Anundlall Doss, who obtained possession thereof under his purchase; that besides this purchase-money the plaintiff had received nothing on account of her debt. The plaintiff also alleged that the defendant,

(1) See on this point the following *bindmani Dasi*, 4 B. L. R., O. C., 83 cases cited in the argument before the Appellate Court—*Kamini Debi v. Ramlochan Sircar* 5 B. L. R., 450; and *Neerunjun v. Kamini Debi*, 5 B. L. R., 460n.; *Mookerjee v. Opendro Narain Deb*, S. C. on appeal, 10 B. L. R., 60n.; 10 B. L. R., 57.
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at the time of his purchase, was aware of the existence of the mortgage. The plaintiff prayed for an account, for foreclosure or sale, for possession, and for such further relief as the plaintiff might be entitled to.

From the written statement of the defendant Anundlall Doss, it appeared that, under a writ of *fi. fa.* issued on the 23rd March 1864 in the suit of one Thomas Owen against Muttylall and Nobinchunder, the Sheriff, on the 7th July 1864, seized and put up for sale the right, title and interest of Nobinchunder and Muttylall in the said house and land, and it was purchased by Goureychurn Chatterjee, but at his request transferred by the Sheriff to the defendant Anundlall, and on the 10th August 1864 the Sheriff executed in favor of the defendant Anundlall a bill of sale of the right, title and interest of Muttylall Bose and Nobinchunder Bose; that the defendant Anundlall had no notice at the time of his purchase of the plaintiff's mortgage; that on 22nd February 1866 the Sheriff, in pursuance of the writ of *fi. fa.* mentioned in the plaintiff's bill, put up for sale the right, title and interest of Nobinchunder Bose, Muttylall Bose, and Gopaul Chunder Bose of in and to the said house and premises, and one Nobongo Moonjery Dasseer became the purchaser, and transferred the said purchase to the defendant Anundlall, who obtained from the Sheriff and the purchaser and her son a bill of sale thereof on 18th June 1866. The defendant Anundlall submitted that the mortgage mentioned in the plaintiff's bill, even if executed by the parties by whom it purported to be executed, was fraudulent, and was executed to avoid payment of the decree which then remained unsatisfied against Nobinchunder and Muttylall, in respect of which the *fi. fa.* in the suit of Thomas Owen was issued, and was therefore void as against the defendant, and that the shares of the said Nobinchunder and Muttylall in the said house and premises did not pass under the mortgage; but the writ of *fi. fa.*, in execution of which the sale of 22nd February 1866 took place, having been issued at the instance of the plaintiff, the said property was sold discharged of the mortgage debt, even if the said mortgage were held to be otherwise valid and binding. The defendant further submitted that if the Court should be of

opinion that the sale of 22nd February 1866 did not discharge the mortgage debt, then that the said mortgage could operate only against the share of Gopalchunder Bose in the said house and premises.

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PHEAR, J., after stating the facts, observed, that if the mortgage on which the plaintiff relied was established, the first question would be whether the sale of July 1864, effected under Mr. Owen's *fi. fa.*, which was issued in March 1864 before the date of that mortgage, would not prevail against it. That the defendant urged that that mortgage was made without valuable consideration, and that the case of the plaintiff was that it was made in pursuance of the original agreement, on which the plaintiff lent her money on the 9th April 1863, and that therefore it was founded on substantial consideration.

The learned Judge having then examined the evidence on this point said, that he was on the whole disposed to think that the defendant's contention to the effect that the mortgage of 27th April 1864 did not stand on the consideration of the loan of May 1863 was a just contention.

Assuming, however, that the mortgage was an effective conveyance or instrument, he asked what was the effect of Mr. Owen's *fi. fa.* which preceded it? He then continued as follows:—

This question, as well as one which will occur presently, seems to necessitate a slight examination of the English cases so far as they bear on the operation of a writ of *fi. fa.*

I have more than once in this Court had occasion to express the opinion that an order for the sale of a judgment-debtor's goods, made to enforce execution of a decree, whatever its shape, and whether preceded by actual attachment or not, has the effect of binding the debtor's property as against any alienations which the debtor himself may make after its date. The proceedings in execution taken for the purpose of effecting a sale are in a sense proceedings in the suit against property, and all persons, who purchase from the judgment-debtor pending those proceedings, come into the position of purchasers *pendente lite*, and in a case lately before me and now pending before an

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I felt myself obliged to act on that view with regard to the operation of the writ of *fi. fa.* issued by this Court in a suit which had been commenced in the Supreme Court. The English cases which I have been able to find touching on this point seem to support that view entirely. Doubtless a writ of execution in the English Courts of whatever form is issued as of course founded on the record and judgment signed, but it is in its nature a judicial order operative as such till set aside even though taken out irregularly. This was settled in *Blancheny v. Burt* (2), and it was expressly stated by Pollock, C.B., in *Wright v. Mills* (3) that the issuing of a *fi. fa.* was a judicial act.

As against the owner of goods, the writ of *fi. fa.* is an order that the goods be sold, and it is operative from the date of *teste*, which, under the old practice, might have been a date long antecedent to the actual issue, though as against *bonâ fide* purchases for value the Statute of Frauds stayed its operation till it was delivered to the Sheriff. This matter was first explained in *Bragner v. Langmead* (4).

The operation of a *fi. fa.* in itself was to give the judgment-creditor a right to have the property sold: it did not alter the property in the goods, but it originated the right to sell in the judgment-creditor, which took priority from the date of the writ. The leading case on this point is *Giles v. Grover* (5): see *per* Tindal, C.J., at p. 201. The principle was also explained by Littledale, J., in *Lucas v. Nockells* (6), and by Lord Ellenborough in *Payne v. Drewe* (7). There remains I think no doubt what the effect of a *fi. fa.* is in England as regards the property against which it operates. There I need hardly say the writ only issues against goods and chattels, and it is one of the questions in the present case, what did the writ issued by Mr. Owen in 1864 operate

(1) I. L. R., 1 Calc., 104.

(4) 7 T. R., 20.

(2) 4 Q. B., 707.

(5) 1 Cl. & F., 72.

(3) 5 Jur., N. S., 771.

(6) 10 Bing., 157, see p. 182.

(7) 4 East, 523.

upon? The plaintiff says it operated solely on the defendant's equity of redemption in the premises. This position is I think unfortunate, because there is ample authority to show that in England the writ of *fi. fa.* cannot be made use of against the equity of redemption in such property as the writ itself can operate on. For instance, although the Sheriff can seize the leasehold of the debtor, he cannot seize the debtor's equity of redemption in the leasehold, because the legal estate is in the hands of the mortgagee. A *fi. fa.* in England issuing from the Common Law Courts was only directed to legal assets, and in the eye of the Common Law Courts the mortgagor had no legal estate in property mortgaged. The cases of *Burdon v. Kennedy* (2) and *Scott v. Scholey* (2) serve to establish this proposition.

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But in this Court, which is a Court of Equity as well as of law, the relations between mortgagor and mortgagee of immoveable property, though no doubt governed by the mortgage contract, do not amount to two estates or two sorts of property. This Court only recognises in the mortgagee the right to recover the money due on the mortgage, and the right to obtain and hold the mortgaged property till foreclosure as security for repayment. On the other hand, the mortgagor has the whole beneficial interest in the lands subject to the mortgagee's right to have effect given to his security.

And from the date of the Charter of the Supreme Court, the writ of *fi. fa.* has issued indifferently against all classes of property belonging to the debtor without any distinction as to whether it is land, *i. e.* immoveable or moveable. This is pointed out in the Master's Report in *Freeman v. Fairlie*, printed, I think, in 1 Moore's Indian Appeals at the end of the case of *Mayor of Lyons v. East India Company* (3). And every form of writ of *fi. fa.*, from whatever side of the Court issued, to which I have been able to get access, is couched in the same perfectly general terms. Form 10 given in the rules of the Supreme Court, which were made after the passing of Act VI of 1855, is in these words:

(1) 3 Atk., 738.

(2) 8 East, 467, see p. 483.

(3) p. 305.

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"PROCESS OF EXECUTION AGAINST PROPERTY.

Writ of fieri facias on a Judgment for Plaintiff on the Plea Side.

Victoria by the Grace of God of the United Kingdom of Great Britain and Ireland, Queen, defender of the faith, and so forth.

Fort William in Bengal. To the Sheriff of the Town of Calcutta, and Factory of Fort William in Bengal.

Greeting, we command you that you cause to be levied and made of the houses, lands, debts, and other effects, moveable and immovable, of C. D., now or late of in the provinces, districts or countries of Bengal, Behar and Orissa, and the province or district of Benares, or in any of the factories, districts, and places which now are annexed to and made subject to the Presidency of Fort William in Bengal aforesaid, by seizure, and if it be necessary by sale thereof, company's rupees (the amount of all the monies recovered by the judgment) which A. B. lately in our Supreme Court of Judicature at Fort William in Bengal, on the Plea Side thereof, recovered against him, whereof the said C. D. is convicted, and have that money before the Justices our said Court at Fort William aforesaid, immediately after the execution hereof, to be rendered to the said A. B., and that you do all such things as by Act No. VI of 1855 you are authorized and required to do in this behalf, and in what manner you shall have executed this our writ make appear to our said Court at Fort William aforesaid immediately after the execution hereof, and have you there then this writ. Witness Sir Chief Justice at Fort William aforesaid, the day of in the year of our Lord one thousand eight hundred and fifty."

I am of opinion that the *fi. fa.* issued on Mr. Owen's application must be taken to have issued against all the property of the judgment-debtors whatever the character of that property. Those debtors were Muttylall and Nobichunder, and they at the time when the *fi. fa.* was issued had not actually mortgaged the house to the plaintiff, but at most had agreed to mortgage. The *fi. fa.* then in my view operated against their shares in the house from the date when it was issued.

If it be assumed for the moment that they had agreed to mortgage those shares to the plaintiff, then although as against themselves a Court of Equity would treat the agreement to mortgage as equivalent to an actual mortgage, yet this would

not be so as against a purchaser under the *fi. fa.* without notice, and little or nothing as the evidence of an agreement on the part of Muttylall and Nobinchunder to mortgage is, the evidence of the defendant having knowledge of such an agreement at the date of the *fi. fa.* or even at the date of his purchase is still less. It seems to me therefore that even under this hypothesis of an agreement to mortgage, the sale under Mr. Owen's *fi. fa.* passed the property to the purchaser free of any rights or equities of the plaintiff. But I have already said I think it has not been established by evidence that the plaintiff had right of recourse equitable or other to the property in the hands of Muttylall and Nobinchunder at that time, and if so the matter is clear of all question of notice to the defendant.

But the discussion relative to the effect of the *fi. fa.* just gone through at some length leads me to the opinion that whatever had previously happened, and even if the plaintiff's contention as to the mortgage is made out, the sale by the Sheriff on the 22nd February 1866 as between the plaintiff and defendant passed to the defendant the entire share of Nobin, Muttylall and Gopalchunder Bose free of the plaintiff's mortgage lien. That sale was effected at the instance of the plaintiff and by getting the *fi. fa.* issued in execution of the money-decree which had been entered up by her on the bond of May 1863. She got in substance the same right of recourse against the property affected by the *fi. fa.* as she had by the terms of her mortgage on the property affected by that instrument, in other words simply the right to have the property sold and to apply the proceeds of sale to payment of the debt which was owing to her, and which was the same debt, namely, the bond debt in both cases; the alternative right to foreclose does not materially affect the comparison. Had the *fi. fa.* issued at the instance of a third party, any sale effected under it would have passed the property to the purchaser, subject to the plaintiff's prior right to realize her mortgage debt either out of that property or by the coercive process of taking possession of and holding it. As however it was issued at the instance of the plaintiff herself for the purpose of realizing that very debt, it seems plain that the sale and conveyance of the property

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could not be subject to a still remaining right in her to sell the property over again to realize that debt.

It was put in argument (not expressly but by implication) that after the mortgage the property in the house consisted of two parts, namely, the mortgagee's estate and the mortgagor's estate (or equity of redemption), and that what was sold under the *fi. fa.* was the latter only. I need not now discuss the meanings of these terms as understood in the English system of real property law, administered as that law is in two sets of Courts (common law and equity) of differing jurisdictions. This Court is a Court both of law and equity with complete jurisdiction to deal with the matter according to the true relations between the parties, and I have already pointed out what those relations are in the case of mortgage. I think then that the plaintiff, after having sold the share of Nobin, Muttylall and Gopalchunder under the *fi. fa.* issued by her in 1866, cannot now maintain that those shares still remain mortgaged to her.

Indeed I think it appears on a little consideration that it would be absurd to hold that she sold the property in February 1866 subject to her previous mortgage lien; for by the act of selling she reduced the extent of her lien necessarily by the amount of the purchase-money, and therefore there must be a very substantial difference between the lien subject to which the property was put up for sale and bought, and the lien which remained to the plaintiff after the sale. The only other alternative seems to be that the property was put up for sale and sold subject to a lien which could only be ascertained by solving an algebraic equation, and that as a matter of practice is absurd.

The result is that, in the view of the case at which I have arrived, the plaintiff cannot set up any mortgage against the defendant Anundlall Doss in respect of the shares of Nobin, Muttylall and Gopalchunder Bose in this house.

This suit must be dismissed with costs No. 2 as against Anundlall Doss.

From this decision the plaintiff appealed.

Mr. *Kennedy* and Mr. *Bonnerjee* for the appellant.

Mr. *Jackson* for the respondents.

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Mr. *Kennedy*.—No change was produced in the law by giving the Courts here power to administer both law and equity; the fact that equity will not grant relief causes no change in any strictly legal rights to which the plaintiff may be entitled. Whether there was notice or not is immaterial if the mortgage is a valid one, but the inference to be drawn from the evidence is that there was notice. The sale of the right, title and interest of the mortgagor cannot have any effect on the mortgagee's title; at any rate the sale of the equity of redemption of a portion of the property could not discharge the rest. [PONTIFEX, J., referred to *Syud Emam Montazooddeen v. Rajcoomar Dass* (1) and *Syed Nazir Hossein v. Pearoo Thovildarinee* (2).] Those cases are decided with respect to mofussil bonds, which are different: here the mortgage was in the English form. There is an Act (VI of 1855) which specially empowers the sale of the equity of redemption. It has been deemed inequitable to permit the mortgagee to sell for the same debt the property on which the debt was created and to retain his lien, so he could not execute his decree against the mortgaged property. Here only the right, title and interest of the mortgagors were sold, and not the right, title and interest of any other person. The remedy of a mortgagee until 1855 was not sale but foreclosure. The mortgagee cannot sell the equity of redemption; see *Kamini Debi v. Ramlochun Sircar* (3) and *Ramlochun Sircar v. Kamini Debi* (4). [PONTIFEX, J., referred to the principle of tacking.] The doctrine of tacking does not apply in India. [PONTIFEX, J.—Would it not apply in Calcutta to a mortgage in the English form?] The law of this Court in 1864 was the Civil Procedure Code, under which an attachment is necessary before sale; here there was no attachment. It is well settled that a person taking under a sale by a judgment-creditor can take nothing except what he had a right to sell. *Watts v.*

(1) 14 B. L. R., 408.

(3) 5 B. L. R., 450.

(2) *Id.*, 425 note.

(4) *Id.*, 460 n; and on appeal, 10 B. L. R., 60 n.

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Porter (1) is completely got rid of; see *Whitworth v. Gordon* (2), *Holroyd v. Marshall* (3), *Eyre v. Macdowell* (4), and *Anandall Dass v. Radhamohan Shaw* (5). The fact therefore of a man having a judgment against him does not enable him, by having his property sold, to sweep away all equitable rights against himself by reason of contracts made by him. As to the effect of a judgment under the statutes of Westminster, see *Neate v. Duke of Marlborough* (6); an *elegit* had to be issued. [GARTH, C. J., referred to Coote on Mortgages, p. 31, 3rd ed., where he says, that "though an equity of redemption was not extendible at law under 29 Car. ii, c. 3, yet the judgment formed a lien on the land, and the creditor might file his bill to redeem."] The hovering lien created by an *elegit* does not exist in this country. Although the Supreme Court administered both law and equity, the same Judges sat in different capacities: the change in the constitution of the Courts in 1862 did not make any difference so as to affect the rights of suitors. A mortgagee by the purchase of the mortgage property becomes a trustee for the mortgagor—*Kamini Debi v. Ramlochan Sircar* (7); but this would be an unnecessary precaution if it was considered the equity of redemption had been sold, as the mortgagor would not have been injured. In that case the proceeding is considered as an attachment and sale of something subject to the mortgage; see *per Macpherson, J.*, in that case, p. 458; see also *Brajanath Kundu Chowdry v. Gobindmani Dasi* (8), and Act VIII of 1859, ss. 205, 215, 240. There is no way here of registering a judgment and so making it a lien. Until attachment the property was not bound at all; see s. 246. [GARTH, C. J.—That provides for the case of an execution-creditor and a third person, which is not the present case.] The intention of the Procedure Code is to place the turning point of the lien at the attachment; and s. 246 shows that previously to attachment there was no lien. [PONTIFEX, J.—S. 246 is a mere section of pro-

(1) 3 E. and B., 743.

(2) Cr. & Ph. 325.

(3) 10 H. L. C., 191.

(4) 9 H. L. C., 619.

(7) 5 B. L. R., 450.

(5) 2 B. L. R., F. B., 49, see pp.

62, 64, 70 and 72; S. C., on appeal, 14

Moore's I. A., 543.

(6) 3 My. & Cr., 407.

(8) 4 B. L. R., O. C., 83.

cedure. GARTH, C.J.—Of procedure in the nature of an interpleader, so that it might be summarily determined in case of dispute whose the land is? Mr. *Jackson*.—A suit begun in the Supreme Court may be continued under the procedure of that Court; see 24 and 25 Vict., c. 104, s. 9, and *Dorab Ally Khan v. Khajah Moheooddeen* (1).] *Nerunjun Mookerjee v. Opendro Narain Deb* (2) shows that a mortgagee cannot sell the equity of redemption except by special leave of the Court. [Mr. *Jackson*.—There is a rule of Court now to that effect; see Rule 92 of the Rules of February 1875.] That rule contains a proviso when the mortgagee is willing to join in the conveyance to a purchaser; this must mean that a sale by the mortgagor would not pass the whole interest, or why ask the mortgagee to join in the conveyance.

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Even if the *fi. fa.* is valid, though it is submitted attachment was necessary, yet it ought only to have the effect of an attachment, *i. e.*, apply from the time of taking possession under it. [Mr. *Jackson* refers to Act XXIV of 1865.] That does not affect the question; it only shows, if anything, that the procedure up to that time had been irregular. [GARTH, C.J.—The Registrar tells me that a *fi. fa.* was only issued in old suits, not in new ones. May we not presume then that this was an old one, a *fi. fa.* having been issued.] The learned Counsel contended, that on the evidence there was sufficient to show that there was an agreement for the mortgage, and that the mortgage having been executed in pursuance of that agreement, was executed on substantial consideration.

Mr. *Jackson* for the respondents.—Act XXIV of 1865 does justify the issue of a *fi. fa.* in this case. S. 2 refers to cases where execution has been taken out; s. 3 to cases in which execution has not been taken out: the former are to be executed according to the High Court procedure; the latter, though executed according to the procedure of the Supreme Court, are to be valid. If the procedure had been regular up to 1865, what object would the Act have had; there would have been no defect to cure.

(1) I. L. R., 1 Calc., 104.

(2) 10 B. L. R., 57.

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The Full Bench decision in *Syud Emam Montazuddeen's* case cannot be distinguished by being a case of a mofussil mortgage,—that is not the ground of the decision; see pp. 423, 425. It applies directly to this case.

The case of *The Bank of Bengal v. Nundolall Doss* (1) shows that an equity of redemption can be sold. The principle of the case of *Kamini Debi v. Ramlochan Sircar* (2) is not applicable to this case: the state of facts is wholly different. On the question of whether there was an agreement to mortgage, the learned Counsel was not called upon.

Mr. *Kennedy* in reply.—There is a great difference between charges by mortgage and by bond as to subsequently bringing a suit. The Full Bench case only applies to the facts of the particular case. [PONTIFEX, J.—The whole question was fully discussed and considered in that case: it was decided on principle.] Does an action on a covenant in a mortgage in which the mortgagee recovers money by arrest of person or sale of chattels, do away with the mortgage lien or act as a bar to a suit for foreclosure? [PONTIFEX, J.—Is there a conveyance on a decree for sale in a mortgage suit?] Yes, always here, how otherwise is the purchaser to obtain the subject of his purchase. [PONTIFEX, J.—You would then never be able to sell the mortgagee's lien at all. There is no such thing under Act VIII of 1859 as selling the mortgagee's lien: you sell the right, title and interest of the mortgagor under a money-decree, and under a sale in a mortgage suit you sell precisely the same. GARTH, C.J.—Why cannot a mortgagee sell subject to his own lien in the same way as other estates are sold subject to liens?]

The case of *The Bank of Bengal v. Nundolall Doss* (1) is inconsistent with the Full Bench decision. Since the Statute of Will. IV., a *fi. fa.* would issue in England against the mortgaged property, but it could not be contended that it barred a suit for foreclosure.

Cur. adv. vult.

GARTH, C. J., after stating the facts, delivered the judgment

(1) 12 B. L. R., 509, see p. 515. (2) 5 B. L. R., 450.

of the Court. The portion of the judgment relating to 14-48ths share was as follows:

With respect to the remaining 14-48ths, the defendant Anundlall claims to be a purchaser in priority to, or in exclusion of, the mortgage on the following grounds: First with respect to Nobinchunder's 6-48ths and Muttylall's 4-48ths, the defendant Anundlall proves that the right, title and interest of Nobinchunder and Muttylall in the property were sold by the Sheriff on the 7th July 1864 under a writ of execution issued on 23rd March in a suit brought by one Thomas Owen against Muttylall and Nobinchunder, such sale being made to one Gourychurn, by whose direction the purchase was transferred to Anundlall, to whom a conveyance was executed by the Sheriff on the 10th of August 1864.

The plaintiff, on the other hand, insists that the alleged agreement for a mortgage of this property to her was made on the 6th of May 1863, and that the Sheriff's sale could not operate to the prejudice of such alleged agreement. We are however unable to discover sufficient evidence of this alleged agreement for a mortgage. The entries appearing in the books of Messrs. Rogers and Remfry on which the plaintiff relies (even assuming that they were properly receivable in evidence) are far too indefinite to prove that there was a binding agreement for a mortgage of this particular property on the 8th of May 1863 when the money was advanced on the bond, or prior to the actual date of the mortgage. The entries do not show what property was to be included in the mortgage, nor what were to be its terms, or that the lender of the money stipulated for the security of a mortgage. We are therefore of opinion that the Sheriff's conveyance to Anundlall in 1864 overrides the mortgage upon which the plaintiff sues.

And Anundlall also relies on a further sale by the Sheriff in 1866 made under the following circumstances:—On the 2nd of February 1866, the Sheriff, under another writ of execution, issued upon the judgment entered upon the plaintiff's warrant of attorney of the 6th of May 1863, sold the right, title and interest of Nobinchunder, Muttylall and Gopalchunder in the property to one Nobongo Monjery Dabee, by whose direction

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the purchase was transferred to Anundlall, to whom a conveyance was executed by the Sheriff on the 18th of June 1866.

The plaintiff insists that this sale, though made at her own instance and without notice of her mortgage, passed only the right, title and interest of Nobinchunder, Muttylall and Gopalchunder in the equity of redemption subject to the mortgage, and did not affect the mortgage itself, so as *pro tanto* to discharge or annul it; and that in fact such sale must be treated precisely in the same manner as a sale upon a judgment of a person who is not a mortgagee. This argument of the plaintiff only affects Gopalchunder's share, as we have already stated that in our opinion the shares of Nobinchunder and Muttylall passed under the Sheriff's sale in 1864. But we are unable to assent to the argument as affecting Gopalchunder's share. We think that a mortgagee selling in execution the right, title and interest of his mortgagor obviously stands in a different position from a stranger selling in execution the mortgagor's right, title and interest. Take for example the case of an estate worth Rs. 2,000, but subject to a mortgage for Rs. 1,000. If the mortgagor sold by contract, or if his judgment-creditor sold in execution the equity of redemption for Rs. 1,000, the mortgagor would in each case benefit by the sale and receive in effect the full value of the estate, Rs. 2,000. But if the mortgagee could sell separately in execution the equity of redemption for Rs. 1,000, the result would be that his own debt would be discharged, and the purchaser would hold an estate worth Rs. 2,000 for the price of Rs. 1,000, and the mortgagor would lose an estate worth Rs. 2,000 having received only the mortgage money of Rs. 1,000.

And though we asked for authority to support the plaintiff's argument, we were not referred to any case, where under a mortgage in the English form the equity of redemption has been separately sold under a money-decree recovered by the mortgagee. The only case we can find in the English reports in which the question was approached, is *Lyster v. Dolland* (1), which is very imperfectly reported, and was ultimately decided

(1) 1 Ves., 431.

by Lord Thurlow on the ground that an equity of redemption could not be extended under the Statute of Frauds. One of Lord Redesdale's arguments in that case appears to have been that such a sale would in effect defeat the mortgagee's own agreement for a redemption. Under the present law in England, an equity of redemption can be reached by a judgment-creditor only by means of an equitable execution, as it is called, or through the decree of a Court of Equity, which would necessarily, by the proceedings in the suit, be informed of the existence of the mortgage, and the fact that the judgment-creditor was also mortgagee.

We are of opinion that a mortgagee is not entitled by means of a money-decree obtained on a collateral security, such as a bond or covenant, to obtain a sale of the equity of redemption separately, because by so doing he would deprive the mortgagor of the privilege which, upon the principle of considering the estate as a pledge, a Court of Equity always accords to a mortgagor, namely, a fair allowance of time to enable him to discharge the debt and recover the estate. This privilege is an equitable incident of the contract of mortgage, and it would be inequitable to permit the mortgagee to evade it; to do that circuitously which he could not do directly.

In the present case the sale of the Sheriff in 1866 was of the right, title and interest of the mortgagors, the sale being at the instance of the mortgagee without disclosing her mortgage and without notice of the amount due to her as a charge upon the property. The purchase-money would appear as in the case of *Lyster v. Dolland* (1), to have been estimated on the value of the unencumbered shares, and it has been received by the plaintiff. This sale has not been objected to by the mortgagors who are parties to this suit, and possession was at once taken under it and has been held unchallenged ever since. Under these circumstances we are of opinion that the sale and conveyance by the Sheriff must be considered to have passed the entire equitable estate in Gopalchunder's share, and we therefore concur with Phear, J., in dismissing the plaintiff's suit, so far as respects the 14-48ths of Nobinchunder, Muttylall and Gopalchunder.

(1) 1 Ves., 431.

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Under the circumstances we think the appellant must pay Anundlall's costs of this appeal, and must add her own costs of this suit and appeal to her security, and Phear, J.'s decree will be modified accordingly.

Decree varied.

Attorney for the appellant: Mr. Remfry.

Attorney for the respondents: Baboo G. C. Chunder.

ORIGINAL CRIMINAL.

Before Mr. Justice Pontifex.

1876
 April 13.

THE QUEEN ON THE PROSECUTION OF MORAD ALI v. HADJEE
 JEEBUN BUX.

Act X of 1875 (High Courts' Criminal Procedure Act), s. 147—Case transferred to High Court—Refund of Fine on Quashing Conviction—Notes of Evidence taken by Magistrate.

The High Court has no power, under s. 147, Act X of 1875, to order a fine to be refunded on quashing a conviction (1).

The Court in this instance decided whether the case should be transferred under s. 147 on the notes of the evidence taken by the Magistrate at the trial.

IN this case a rule had been granted by Phear, J., on the 30th March, calling on Mr. Dickens, Police Magistrate for the Northern Division of Calcutta, and Morad Ali, the complainant in the case, to show cause why the case should not be transferred to the High Court under s. 147, Act X of 1875. The facts were, that the complainant and defendant lived in adjoining houses between which there was a party wall. A hole was found to have been made in the wall, apparently from the defendant's side, and Morad Ali instituted a charge against Hadjee Jeebun of having committed criminal mischief. On that charge Hadjee Jeebun was convicted by the Magistrate Mr. Dickens and fined Rs. 50, which was ordered to be paid to the complainant. The ground of the application for transfer to the High

(1) In *In re Louis*, 15 B. L. R., Ap., 14, the Court ordered the fine to be refunded.

Court was that there was no evidence adduced at the trial of any intention on the part of the defendant to commit mischief.

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Mr. *Branson* and Mr. *Evans* now appeared to show cause against the order.

Mr. *Jackson* and Mr. *Bonnerjee* contra.

On the part of Morad Ali an affidavit of Mr. Pittar, and on behalf of Hadjee Jeebun Bux, a joint and several affidavit of Mr. Leslie and Hadjee Jeebun Bux, were filed. To the latter affidavit was annexed an attested copy of the notes of the evidence taken by the Magistrate at the hearing of the charge.

Mr. *Branson* went into the merits of the case, and contended that the defendant had been rightly convicted. [Mr. *Jackson*.—The notes of the evidence taken before the Magistrate must be taken to be the materials on which the Court is now to decide. See *In re Louis* (1). Affidavits cannot be used to supplement that evidence.] There the case had been brought up under s. 147; this is an order calling on us to show cause why it should not be sent up. The notes do not comprise all the evidence taken before the Magistrate. He is not bound to take notes at all. [PONTIFEX, J.—Is it a case of mischief at all? The wall appears to be a party wall. But even if it had been the complainant's, the defendant's conduct seems to have been trespass, not criminal mischief.]

Mr. *Evans* on the same side.—Mr. Leslie's affidavit mentions evidence which does not appear in the notes of evidence taken by the Magistrate. Where it appears that all the evidence is not before the Court, the Court ought to call for the whole of the evidence, or it might rehear the case.

Mr. *Jackson* submitted that all the materials necessary for decision were before the Court, and that on those materials the conviction ought to be quashed.

The Court was of opinion that on the evidence which had come up from the Police Court there was no case for convicting

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the defendant of mischief: inasmuch as there was no evidence to show that the hole was made in the wall maliciously or for the purpose of annoying the prosecutor. The conviction was therefore ordered to be quashed.

Mr. *Jackson* applied for an order for refund of the fine: but the Court was of opinion it had no power under the section to order repayment of the fine.

An application by Mr. *Jackson* for costs was refused, the Court being of opinion that the defendant was not wholly free from blame in the matter, and that the prosecution did not appear to have been a malicious prosecution.

Conviction quashed.

Attorney for the complainant: Mr. *Pittar*.

Attorney for the defendant: Mr. *Leslie*.

Before Mr. Justice Phear and Mr. Justice Markby.

1876
 March 9,
 16 § 20.

THE QUEEN v. UPENDRONATH DOSS AND ANOTHER,

Act X of 1875 (High Courts' Criminal Procedure Act), s. 147—Case transferred to High Court—Notice to Prosecutor—Penal Code, ss. 292 and 294—Specific Charge—Procedure on Transfer to High Court.

In an application for the transfer of a case under s. 147, Act X of 1875, in which the prisoner has been convicted and is undergoing imprisonment, it is in the discretion of the Court to order, for sufficient *prima facie* cause shown, that the case be removed, without notice to the Crown.

Semle.—A charge under ss. 292 and 294 of the Penal Code should be made specific in regard to the representations and words alleged to have been exhibited and uttered, and to be obscene; and the Magistrate, in convicting, should in his decision state distinctly what were the particular representations and words which he found on the evidence had been exhibited and uttered, and which he adjudged to be obscene within the meaning of those sections. Where no such specific decision has been given, the High Court, when the case has been transferred under s. 147, Act X of 1875, may either try the case *de novo*, or dismiss it on the ground that the Magistrate has come to no finding on which the conviction can be sustained.

THE prisoners had been charged with offences under ss. 292 and 294 of the Penal Code, and had been on conviction sentenced

by the Magistrate for the Northern Division of Calcutta to one month's simple imprisonment. On their application to the High Court, Phear, J., made an *ex parte* order under s. 147 of Act X of 1875, removing the case to the High Court, and allowed the release of the prisoners on bail under s. 148. The case now came on for hearing.

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Mr. *Branson*, Mr. *M. Ghose*, and Mr. *Palit* appeared for the prisoners.

The *Standing Counsel* (Mr. *Kennedy*) for the Crown.

Mr. *Branson* contended that the conviction could not be sustained, first, on account of the vagueness of the charge, inasmuch as it did not specify the nature of the crime charged: secondly, that the prisoners had committed no offence under ss. 292 and 294; and thirdly, that the evidence did not justify the conviction. He also contended that the Magistrate had no power to dispose of the case summarily.

The *Standing Counsel* raised an objection to the order made removing the case to the High Court, inasmuch as no notice thereof had been given to the Crown. The Court offered to adjourn the case if the Crown required time to enable them to proceed with it, but the *Standing Counsel* said he thought an adjournment was unnecessary. He then contended that the Magistrate had power to try, and dispose of, the case summarily, and that on the evidence the conviction ought to be upheld. After hearing Mr. *Branson* in reply, the Court took time to consider its judgment, which, on a subsequent day, was delivered by

PHEAR, J.—This case now comes before us by reason of its having been removed to this Court from the Court of the Magistrate of Calcutta, Northern Division, by an order made under s. 147 of the High Courts' Criminal Procedure Act.

The learned *Standing Counsel*, on behalf of the Crown, objected that the order had been irregularly made, because the Crown was not served with notice of the application for it,

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and was not given an opportunity of being heard upon that application. We are of opinion, however, that when, as in the present case, a conviction has been arrived at by the Magistrate, and the petitioner is actually suffering imprisonment thereunder, it is within the discretion of this Court to order for sufficient *prima facie* cause shown, on the application of the prisoner, that the case be removed, without notice to the Crown. We intimated our readiness to give time to the Standing Counsel, if he required it, for the purpose of this hearing, but he said he was quite prepared to go on with the case without delay.

The charge preferred against the petitioners and some other person, upon which they were tried by the Magistrate, appears in the Court-book, which the Magistrate has sent up to us, in the following words:—"Defendants are charged with having, on 1st March, at Beadon Street in Calcutta, exhibited to public view certain obscene representations. Defendants are further charged with having at the time and place aforesaid uttered or recited certain obscene words to the annoyance of others: ss. 292 and 294 of the Penal Code;" and the original order or conviction made and signed by the Magistrate after hearing the evidence given on both sides appears to have been as follows:—"Defendants (2) and (3) Upendronath Doss and Omritolall Bose" (the two petitioners to this Court) "are found guilty under ss. 292 and 294 of the Penal Code, and sentenced to suffer imprisonment for one month."

The scope of each of the two sections, 292 and 294, of the Penal Code is wide; and it is much to be regretted that the charge against the prisoners was not made specific in regard to the representations and words alleged to have been exhibited and uttered, and to be obscene, before at least the accused persons were called upon to answer it. And it was certainly very important, both in the interest of the accused persons, and of the public, that the Magistrate, in his decision of the matter, should have stated distinctly what were the particular representations and words which he found in the evidence the convicted persons had exhibited and uttered, and which he adjudged to be obscene within the meaning of these sections.

Had the case remained as the Magistrate's book represents it, we should have been reduced to the alternative of either practically trying the case *de novo* or of dismissing it, upon the ground that the Magistrate had come to no finding upon which his conviction could be sustained. Fortunately, however, since the conviction has been impeached by the making of the application for the removal of the case to this Court, the Magistrate has formally drawn up his specific findings of fact, and his order thereon, and we may now safely assume that this document discloses all that in the opinion of the Magistrate is established by the evidence against the petitioners within the scope of ss. 292 and 294 of the Penal Code. (After going through the specific findings of the Magistrate his Lordship found that the evidence was not sufficient to justify the findings of fact arrived at by the Magistrate, and that the words and passages were not obscene within the meaning of ss. 292 and 294, and continued :) It thus appears to us that the grounds upon which the Magistrate has placed his conviction in this case fail: and we can discover in the evidence no other ground upon which it could legally be supported. It follows that the conviction must be quashed, the sentence set aside, and the petitioners released from the obligation of their recognizances.

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NATH DOSS.*Conviction quashed.*

Attorney for the Crown: *The Government Solicitor, Mr. Sanderson.*

Attorney for the defendants: *Baboo G. C. Chunder.*

APPELLATE CIVIL.

Before Mr. Justice Glover and Mr. Justice Mitter.

GOUREE LALL SINGH (PLAINTIFF) v. JOODHISTEER HAJRAH
AND OTHERS (DEFENDANTS).*

1876

Jany. 26.

Regulation VIII of 1819, ss. 8 and 14—Suit for Reversal of Sale—Service of Notice.

Where, in a suit to set aside a patni sale under Reg. VIII of 1819, it was proved that the notice of sale was first stuck up in the cutchery of the ijaradar (the Mehal having been let out in ijara by the patnidar), and on the refusal of the ijaradar's gomasta to give a receipt of service, it

* Regular Appeal, No. 295 of 1874, against a decree of the Subordinate Judge of Zilla East Burdwan, dated the 27th April 1874.

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was taken down, and subsequently personally served on the defaulting patnidar at his house, which was at some distance from the patni mehal, *held*, that the object of the provisions in Reg. VIII of 1819 as to service of notice of sale is not only to give notice of sale to the defaulter, but also to the under-tenants, and to advertize the sale on the spot for the information of intending purchasers; but though those provisions had not been strictly complied with, yet as the plaintiff (the patnidar) did not allege that in consequence of the defective publication there was not a sufficient gathering of intending purchasers; nor that the under-tenants were ignorant of the sale, and were prejudiced by such ignorance, nor that the mehal was sold below its value, *held*, that the defect did not amount to a "sufficient plea" under s. 14 for setting aside the sale.

Byhantha Nath Sing v. Maharajah Dhiraj Mahatab Chand Bahadur (1) commented on and distinguished.

Baboos *Bhowany Churn Dutt* and *Umbica Churn Bose* for the appellant.

Baboos *Mohiny Mohun Roy* and *Kally Prosonno Dutt* for the respondents.

The facts and arguments are sufficiently stated in the judgment of Mitter, J., which was as follows :—

MITTER, J.—This is a suit for the reversal of a patni sale under Regulation VIII of 1819. The claim is based upon two grounds, *viz.* (1) that there was no arrear of rent due from the plaintiff on the day of the sale, the same having been paid to the zemindar two days before the day of sale, and (2) that the notification of sale was not duly published according to s. 8 of Regulation VIII of 1819.

The lower Court has dismissed the suit. Upon the first point the lower Court has found that the allegation of payment of rent two days before the day of sale is not true, and that the dakhila produced to establish that payment is not genuine. As regards the publication of the notice of sale what the lower Court finds is this, that it was first stuck up in the cutcherry of the ijaradar (the mehal having been let out in ijarah by the patnidar), but the gomasta of the ijaradar having refused to grant a receipt of the service of the notice to the peon who took it, it was taken down and subsequently person-

ally served upon the plaintiff, the patnidar. The lower Court having come to these conclusions of facts, dismissed the suit.

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On appeal the correctness of these conclusions of facts has been contested upon the ground that they are against the weight of the evidence on the record. I do not think that this contention ought to prevail. I am quite satisfied with the reasons given by the lower Court in support of these conclusions, and I do not think that we ought to disturb his findings in appeal. We must, therefore, accept them as giving the true facts of the case.

The next question that has been raised in appeal before us is, that, accepting these findings of facts as correct, still the sale cannot stand, as the notification of sale was not published in the manner indicated in cl. 2, s. 8 of Regulation VIII of 1819. The plaintiff does not deny that two notices, as required by this clause, were stuck up in accordance with law in the cutcherries of the zemindar and the Collector, but his case rests upon the ground that no notice was published as also required by the same clause in the mofussil. The clause in question first of all lays it down that the notice of sale should be stuck up in the cutcherry of the Collector. Then it further provides: "A similar notice shall be stuck up at the sudder cutcherry of the zemindar himself, and a copy or extract of such part of the notice as may apply to the individual case shall be by him sent, to be similarly published at the cutcherry or at the principal town or village upon the land of the defaulter. The zemindar shall be exclusively answerable for the observance of the forms above described, and the notice required to be sent into the mofussil shall be served by a single peon, who shall bring back the receipt of the defaulter or of his manager for the same, or in the event of inability to procure this, the signatures of three substantial persons residing in the neighbourhood in attestation of the notice having been brought and published on the spot."

Now it is evident from the facts of this case, that the form prescribed above for the publication of the notice in the mofussil has not been strictly complied with, because the notice,

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though at first stuck up in the cutcherry of the ijaradar, was after a short time taken down and personally served upon the defaulter at his house, which is at some distance from the patni mehal. Therefore the question which we have to determine is whether this defect is such as to entitle the defaulter to ask the Court to reverse the sale upon that ground alone. In order to arrive at a satisfactory conclusion upon this question, we must first determine what is the object for which this provision as to the publication of this notice in the mofussil has been made, because if it be simply to give notice of the sale to the defaulter, it is clear that in this case we ought not to give effect to the contention of the plaintiff, who has got a more direct notice of the sale, as it was personally served upon him. It has been decided by Sir Barnes Peacock, C.J., in the case of *Sona Beebee v. Lall Chand Chowdhry* (1), that a patni sale should not be set aside for mere formal defects in the publication of the notice if it proved that it has been served upon the defaulter. This case has been quoted with approbation by their Lordships in the Judicial Committee of the Privy Council in the case of *Ram Sabuk Bose v. Kaminee Koomaree Dossee* (2). The same view of the law has been taken by a Division Bench of this Court in the case of *Pitambur Panda v. Damoodur Doss* (3).

Now it is clear that one of the objects of this provision is to give notice of the sale to the defaulter, and so far as that object is concerned, the plaintiff, as I have remarked above, has no valid ground to complain. But the question is,—is that the sole object? I do not think it is. If it were the sole object, we should have naturally expected that handing over the notice direct to the defaulter or his agent would have been laid down as the ordinary and the principal mode of service, and the sticking up of the notice in his cutcherry, or the publication of the same “at the principal town or village upon the land,” would have been laid down as the substituted mode of service to be resorted to, if it be impracticable to effect the service in the first

(1) 9 W. R., 242.

(2) 14 B. L. R., 394.

(3) 24 W. R., 133. See also *Matunginee Churn Mitter v. Moorary Mohun Ghose*, I. L. R., 1 Calc., 175.

mentioned mode. Then it must be remembered that there is no other provision in the Regulation for advertizing the sale in the mofussil except the one under consideration. Then it also must be remembered that important privileges have been given to the under-tenants by the Regulation to protect their rights, and there is no other provision in it of giving notice of the sale to them than the one indicated in the extract I have made from the Regulation. The letter of the law also leads to this conclusion, because it speaks of the notice of sale being published on the spot. It appears to me from these considerations that the object of this provision in the Regulation is not only to give notice of the sale to the defaulter, but also to under-tenants, and further to advertize the sale "on the spot" for the information of the intending purchasers.

We have, therefore, next to consider whether the defects in the publication of the notice of sale in the mofussil in the case have been such as to defeat the object mentioned above. S. 14 of this Regulation, which gives to the defaulter the right of contesting the validity of the sale in a Civil Court, provides that the sale should be reversed upon "a sufficient plea" being established. Has the plaintiff established "a sufficient plea" in this case which would entitle him to ask the Court to set aside the sale? It has been found that the notice of the sale was stuck up in the ijaradar's cutcherry and was not taken down until after some time; that the peon, who took it there, asked the gomasta of the ijaradar to grant a receipt of the same, and there was some conversation between them as to whether he (the gomasta) was the right person who should give this receipt; and on his finally refusing to give it that the notice was taken down and brought away to be personally served upon the defaulter. The plaintiff has not established any circumstance in this case to show that this was not sufficient publication of the notice of the sale in the mofussil. He does not state that in consequence of this defective publication of the notice there was not a sufficient gathering of intending purchasers at the time of the sale. Nor does he complain that his under-tenants were ignorant of the impending sale of the parent talook, and were therefore prevented from depositing the arrears of rent to stay the sale. He in

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his plaint puts the same valuation upon his patni mehal which it fetched at the auction-sale. Upon the whole I am not prepared to say that the defects established by the plaintiff in the manner of the publication of the sale notification in the mofussil are such as to amount to "a sufficient plea" within the meaning of s. 14 of Regulation VIII of 1819.

It remains to notice a case—*Bykantha Nath Singh v. Maharajah Dhiraj Mahatab Chand Bahadur* (1)—upon which the learned pleader for the appellant laid great stress in the course of the argument. In that case there was no attempt made by the zemindar to publish the notification of sale in the mofussil. There was further a very grave irregularity in sticking up the notice of sale in the Collector's cutcherry, and it was held that these defects were sufficient to vitiate the sale. I do not think that any inflexible rule of law was laid down there, that any departure from the forms laid down in cl. 2, s. VIII of Regulation VIII of 1819, would be sufficient to entitle the defaulter to set aside the sale. What was virtually held in that case was that the irregularities established there were sufficient under the law to vitiate the sale.

The result therefore is that this appeal must be dismissed with costs.

GLOVER, J.—Had it not been for the strongly expressed opinion in the case referred to by Mitter, J., in which case however the judgment was to a certain extent approved of by the Privy Council, I should have thought that the words of the Regulation were imperative, and made all sales void when there had been no proper service of notice in the mofussil cutcherry. But after these decisions I do not see how I can retain my opinion, and I am therefore not prepared to dissent from the judgment of my learned colleague.

The appeal must be dismissed with costs.

Appeal dismissed.

(1) 9 B. L. R., 87.

Before Mr. Justice L. S. Jackson and Mr. Justice D. N. Mitler.

ADHIRANEE NARAIN COOMARY (ONE OF THE DEFENDANTS)

v. SHONA MALEE PAT' MAHADAI (PLAINTIFF) AND

BIDDYA DHUR (DEFENDANT).*

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June 11 & 12
8
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June 15.

Hindu Law—Widow—Maintenance—Lien on Estate of Husband—Bonâ fide Purchaser.

The lien of a Hindu widow for maintenance out of the estate of her deceased husband is not a charge on that estate in the hands of a *bonâ fide* purchaser irrespective of notice of such lien.

A Hindu widow, before she can enforce her charge for maintenance against property of her deceased husband in the hands of a purchaser from his heir, must show that there is no property of the deceased in the hands of the heir.

Debts contracted by a Hindu take precedence of his widow's claim for maintenance, and *semble*, that if a portion of his property is sold after his death to pay such debts, the widow cannot enforce her charge for maintenance against such property in the hands of the purchaser.

Quere.—Whether a Hindu widow, by obtaining against her husband's heir a personal decree for maintenance unaccompanied by any declaration of a charge on the estate, does not lose her charge upon the estate.

THIS was a suit by a Hindu widow for maintenance. The plaint stated that the plaintiff was the widow of the late Rajâ of Killa Koojung; that Biddya Dhur, defendant, who had succeeded to the raj in accordance with the custom of the family, refused to pay her maintenance, and she sued him, and on the 11th of February 1862 obtained a decree for maintenance at Rs. 100 per month; that her maintenance had since been paid up to May 18th, 1868; that Biddya Dhur, defendant, had sold the raj (estates) for the payment of his debts, and the defendant Adhiranee had become the purchaser and obtained possession thereof; that Adhiranee had refused to pay the plaintiff's maintenance, and hence she brought this suit for the amount thereof from 19th May 1868 to 14th May 1871, amounting to Rs. 3,586-10-8.

* Special Appeal, No. 1388 of 1872, against a decree of the Officiating Judge of Zilla Cuttack, dated the 2nd May 1872, affirming a decree of the Officiating Subordinate Judge of that district, dated the 23rd December 1871.

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The defendant Adhiranee filed a written statement, in which she submitted that the suit was not maintainable against her ; that she was not a party to the suit in which the plaintiff had obtained a decree for maintenance ; that the defendant Biddya Dhur was the sole proprietor of the property purchased by her, and neither the plaintiff nor any other person had any interest or proprietary right in the same ; and that the property was not liable to the payment of the plaintiff's claim on it.

The defendant Biddya Dhur also filed a written statement denying his personal liability, and submitting that if recoverable at all the claim was recoverable from the defendant Adhiranee, as the decree for maintenance had been made against the property purchased by her, and that he was entitled to his costs, having been unnecessarily made a defendant.

The Subordinate Judge of Cuttack decided that the defendant Adhiranee was liable for the claim, and that no liability attached to the other defendant. In support of his opinion he referred to *Mussamut Khukroo Misra v. Jhoomuck Lall Dass* (1) and *Ramchandra Dikshit v. Savitribai* (2).

On appeal the Officiating Judge of Cuttack upheld the decision of the Subordinate Judge, on the ground "that the precedents quoted by him in a manner (though not directly) support the view that a charge of maintenance decreed to a widow against a former holder of an estate will follow the estate even if it be sold in satisfaction of debts due by proprietors thereof."

The defendant Adhiranee appealed to the High Court, on the grounds that as purchaser of the property at a sale in execution of a decree against the proprietor thereof, she was not liable for maintenance ; that the decree for maintenance was a personal decree against the defendant Biddya Dhur, and did not bind her : that the rulings cited were not applicable to this case ; that the plaintiff could not claim maintenance from her, until it was clearly proved that she had failed to recover it from the other defendant, who was primarily liable for the same.

Mr. Woodroffe (with him Baboos Juggodanund Mookerjee,

(1) 15 W. R. 263.

(2) 4 Bom. H. C., A. C., 73.

Mohesh Chunder Chowdhry, and Chunder Madhub Ghose) for the appellant.

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Baboos Obhoy Churn Bose and Romesh Chunder Mitter for the respondents.

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Mr. Woodroffe.—The appellant as purchaser of this property in execution of a decree is not liable to have the plaintiff's claim for maintenance made a charge on the property. The decree for maintenance was not made against her, and she took the property without notice of the plaintiff's alleged claim upon it. The defendant *Biddya Dhur* is primarily liable; the decree was passed against him, and he is in possession of the proceeds of the sale of the property which is liable for this claim.

A widow has a right to maintenance from one who takes her husband's property as heir, but irrespective of notice she has no claim against a purchaser at a sale in execution of a decree. The learned Counsel cited the cases of *Srimati Bhagabati Dasi v. Kanailal Mitter* (1), *S. M. Nistarini Dasi v. Makhunlal Dutt* (2), and *Mangala Debi v. Dinonath Bose* (3). The payment of debts, though a charge on an estate, is not a charge on any specific portion of such estate—*Nilkant Chatterjee v. Peari Mohun Dass* (4). The cases relied on in the judgment of the lower Court are not applicable. Even if they are the portions relied on are mere *obiter dicta* in those cases.

Baboo Obhoy Churn Bose for the respondents—The question of notice was not raised before, and consequently there being no objection of such a kind, no evidence on the point was offered.

The defendant never alleged she was not aware of the existence of the several members of the family. The property in question was a *raj*. The cases of *Mussamut Khukroo Misra* *v. Jhoomuck Lall Dass* (5) and *Ramchandra Dikshit v. Savitribai* (6), relied on by the lower Appellate Court, are applicable

(1) 8 B. L. R., 225.

(2) 9 B. L. R., 11.

(3) 4 B. L. R., O. C., 72.

(4) 3 B. L. R., O. C., 7.

(5) 15 W. R., 263.

(6) 4 Bom. H. C., A. C., 73.

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and support the respondents' contention. The claim for maintenance of a Hindu widow remains a charge on the property notwithstanding alienation—*Heeralal v. Mussamat Kousillah* (1).

Baboo *Romesh Chunder Mitter* on the same side.—The widow can enforce a claim for maintenance against a purchaser. Notice is immaterial—*Heeralal v. Mussamat Kousillah* (1). In a case of forfeiture to Government she has been held entitled to her maintenance as a charge on the property forfeited—*Mussamat Golab Koonwur v. The Collector of Benares* (2); see also *Varden Seth Sam v. Luckpatty Royjee Lallah* (3).

Mr. *Woodroffe* in reply.—The cases cited are distinguishable from the present one. Those are cases of a charge recognized by law being allowed unless the alienee can come in and show he is a *bonâ fide* purchaser for value without notice. Here a specific claim must be made and notice of such claim shown—*Mussamat Goolabi v. Ramtahal Rai* (4). An equitable mortgagee must come in and prove his rights. In *Mussamat Golab Koonwur v. The Collector of Benares* (2), the right to maintenance was not disputed: see *Gunga Bae v. The Administrator-General of Bengal* (5). Such a charge cannot be enforced in a case of dower in Mahomedan law—*Mussamat Wahidunnissa v. Mussamat Shubrattun* (6). With regard to debts being a charge on an estate, see *Brij Bhukan Lall Awustee v. Mahadeo Dobay* (7). No authority has been shown which decides that there is a charge for maintenance on all and every part of property alienated if the purchaser has taken without notice of the claim.

Cur. adv. vult.

The judgment of the Court was delivered by

JACKSON, J.—This special appeal was heard by the late Mr. Justice Mitter and myself. We took time to consider our

(1) 2 Agra H. C., 42.

(4) 1 All. H. C., 191.

(2) 4 Moore's I. A., 246.

(5) 2 I. J., N. S., 124.

(3) 9 Moore's I. A., 303.

(6) 6 B. L. R., 54.

(7) 15 B. L. R., 145 note.

judgment, and, shortly after, the illness of my lamented colleague, which continued for some months and was followed by his death, prevented our giving any joint decision, and the parties subsequently requested that I, as the surviving member of the Division Court, should give my judgment, which they agreed to treat as if it had been the judgment of both Judges. Public avocations have left me little leisure, and delay has occurred which I regret very much, but I have given the case my best consideration, and have now arrived at a conclusion. The facts were these:—The plaintiff, Ranee Shona Malee, was the widow of one Ram Hurry, who in his lifetime was the rajah of Killa Koojung. He had not been in the direct line of succession, but came in after the demise of his elder brother and of that brother's son. Rajah Ram Hurry on his death was succeeded by the defendant No. 2, Rajah Biddya Dhur, and he, having refused to allow proper maintenance to the plaintiff, was sued by her, and she recovered a decree for maintenance at the rate of Rs. 100 per mensem. After that the Rajah being greatly indebted, Killa Koojung, which appears to have been the principal ancestral property of this raj, was sold in execution of a decree, and was purchased by the first defendant, Moharanee Narain Coomary, who is the wife of the Maharajah of Burdwan, and the plaintiff alleges that no payment of the amount of her maintenance having been made since the 19th May 1868, she has brought the present suit to recover Rs. 3,586, being the amount due for a little less than three years.

The defendant Moharanee pleaded that the decree which the plaintiff had obtained for her maintenance was one personal to the Rajah, defendant No. 2, and had no concern with the immoveable property Killa Koojung, which property, she said, had been sold on account of the debts of defendant No. 2 and of his ancestors. The Rajah defendant's answer was that the decree for maintenance had been given against him with advertence to the profits of the Killa, which he held by inheritance, and this property having now gone out of his hands and passed to the defendant No. 1, he was no longer liable. Without going very fully into the course which the judgment of the first Court took, it may be stated shortly that,

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in the opinion of the Subordinate Judge, a claim on the part of a Hindu widow for maintenance is good, not only against the persons allied by relationship to the deceased husband, but also against any person into whose hands the husband's property may have come. In other words, he considered it to be a charge upon the estate. He says:—"There is no evidence to show that there is any other paternal property in the hands of defendant No. 2, from which the said maintenance allowance of the plaintiff can be supplied," and therefore he thought that the second defendant Rajah was not liable, and that the first defendant who now held Killa Coojung was liable. He therefore gave a decree against her for the amount claimed. In support of this opinion, he referred to two authorities—of *Mussamut Khuk-roo Misra v. Jhoomuck Lall Dass* (1), and the other a case which he does not seem to have consulted in the original reports, but to have found in the Indian Digest—the case of *Ramchandra Dikshit v. Savitribai* (2).

The defendant Ranee appealed, and the District Judge who heard the appeal affirmed the judgment of the Court below upon what may be called general considerations of equity, but without adding anything to the strength of the decision. The defendant has appealed specially to this Court.

It is not alleged (indeed the contrary appears to be the case) that the defendant had any notice of the claim of the plaintiff to maintenance out of this property at the time when she purchased it, and the question therefore is whether in such circumstances the plaintiff's family and the property being subject to the Mitakshara law, a claim for maintenance would constitute a charge upon the immoveable estate of her husband into whosoever's hands it may have gone, and with or without notice of the claim, so that the defendant is liable to satisfy this demand. I have looked into all the authorities accessible to me, decided cases as well as works on Hindu law, and I am unable to find any authority, either in accepted rule or in decision, which expressly bears out the plaintiff's contention, the only text relied on, that of *Catyayana*, being much too vague.

(1) 15 W. R., 263.

(2) 4 Bom. H. C., A. C., 73.

It is necessary therefore to set out the result of such cases as have been decided on similar questions by the Courts in Bengal and elsewhere. As regards cases under the Bengal law I think it clear upon the authorities here that no such claim can be supported. The cases cited before us were that already mentioned—of *Mussamut Khukroo Misra v. Jhoomuck Lall Dass* (1), *Nilkant Chatterjee v. Peari Mohun Dass* (2), *Srimati Bhagabati Dasi v. Kanailall Mitter* (3), *Mangala Debi v. Dinanath Bose* (4), and *Nistarini Dasi v. Makhunlall Dutt* (5). As to the case of *Mussamut Khukroo Misra v. Jhoomuck Lall Dass* (1), I am bound to say I am unable fully to understand it. The head-note, no doubt, states amongst other things, as the effect of the decision, that a Hindu widow's maintenance is a charge upon the family estate into whosoever's hands the estate may fall. Now the widow, who was the special appellant in that case, had her special appeal dismissed with costs. It is clear, therefore, that whether we might or might not be inclined to concur in the observation made, that was merely a *dictum*, and not a point decided in the case. The case of *Nilkant Chatterjee v. Peari Mohun Dass* (2) bears only very distantly upon this case. What the learned Judge decided in that case and what was affirmed by the Court of Appeal was, that although the payment of debts is a charge on the property of a testator, it is not a charge on any specific portion of the estate. The case of *Srimati Bhagabati Dasi v. Kanailall Mitter* (3) is as strong against the plaintiff as anything can be. In that case, according to the head-note, Phear, J., laid it down that, by the law of Bengal, a Hindu widow "has no lien on the property for her maintenance against all the world irrespective of notice, though she has a right to maintenance out of such property in the hands of any one who takes it with notice of her having set up a claim for maintenance against the heir;" and the learned Judge observed at page 229 :—"In truth, as I threw out in the course of the argument, if the heir has any power of alienation

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(1) 15 W. R., 263.

(3) 8 B. L. R., 225.

(2) 3 B. L. R., O. C., 7.

(4) 4 B. L. R., O. C., 72.

(5) 9 B. L. R., 11.

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at all, it would be most unreasonable that a *bonâ fide* purchaser for valuable consideration should be subjected to the possibility of a charge springing up at any time, though it had no definite existence when he purchased;" and afterwards he says:—" Obviously, the consideration received by the heir for the sale of the deceased's property will, so far as the widow's right of recourse to it is concerned, take the place of the property sold." The case of *Mangala Debi v. Dinanath Bose* (1) is one where the Court of Appeal, referring to a passage in Colebrooke's Digest, 2nd volume, page 133, or page 238 folio edition, which is a precept of Catyayana, held that Mangala the widow could not be turned out by her son from the apartments in which she lived (and which had been the place of residence used and appointed for her by her deceased husband), upon the son's coming of age. In the case of *Nistarini Dasi v. Makhunlall Dutt* (2), Markby, J., following the decision of Phear, J., in *Bhagabati Dasi's* case, dismissed the suit, which was a suit by a Hindu widow for a declaration of her right to maintenance out of her husband's estate, which had been mortgaged to the defendant by the heir, and on appeal it was held that the suit should not have been dismissed by reason of a mistake in the form of the suit, but that the right of the plaintiff should have been enquired into and such relief allowed as she was entitled to consistently with the case made in her plaint.

Now I proceed to consider the cases decided elsewhere than in Bengal, *viz.*, the Bombay case referred to by the Subordinate Judge, and others which I shall state in order. The case of *Ramchandra Dikshit v. Savitribai* (3), it happens curiously, is explained by the learned Chief Justice Sir Richard Couch, who decided it, during the argument in the case of *Nistarini Dasi v. Makhunlall Dutt* (2). In that case Savitribai sued the defendant; who was one of three sons of a person named Moreshvar Dikshit, her husband's father, who, she alleged, had supported her after her husband's death and the defendant contended that as he was only one of three brothers,

(1) 4 B. L. R., O. C., 72.

(2) 9 B. L. R., 11.

(3) 4 Bom. H. C., A. C., 73.

the suit did not lie against him alone, and the Chief Justice in delivering judgment is reported to have said :—" By Hindu law the maintenance of a widow is a charge upon the whole estate, and therefore upon every part thereof. The special appellant is liable for the maintenance." This as I have said was explained by the Chief Justice himself in the case of *Nistarini Dasi v. Makhunlall Dutt* (1), where he says :—" The question there was as to whether one brother could be sued alone, and it was held that he could." This case therefore does not help the plaintiff. Then there is the case of *Mussamut Golab Koonwur v. The Collector of Benares* (2), relied upon by the plaintiff. In that case three brothers, sons of Ujaib Singh, were charged as being implicated in an insurrection. They were summoned to appear and answer, but they absconded, and thereupon, under Regulation XI of 1796 (since repealed), an order was pronounced by the Governor-General in Council declaring their estate to be forfeited. Thereupon Golab Koonwar seems to have petitioned the Governor-General for the restoration of the estates to her, claiming them as her hereditary property. She was referred by the Governor-General to the Courts of law. She sued and obtained a decree in the Provincial court, but that decree was reversed by the Sudder Dewanny Adawlut. Thereupon a further appeal was made to Her Majesty in Council, and amongst the things contended before the Judicial Committee was this, that, supposing all other pleas of Golab Koonwur failed, she was at any rate entitled to maintenance out of the whole property of Ujaib Singh whose widow she was, and their Lordships say in the conclusion of their judgment after disposing of the rest of the case :—" The only other question is the right of Mussamut Golab Koonwur to maintenance out of the whole of the property held to be ancestral. Nothing was urged at the bar against this right, and it appears to us that, on the principle of the decree, it ought to have been recognized," and accordingly she was declared entitled to maintenance thereout. Now the ground of that part of their Lordships' decision is explained by Phear, J., in giving judgment in the case of *Gunga Bae v. The Administrator-General of*

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(1) 9 B. L. R., 11, at p. 27.

(2) 4 Moore's I. A., 246.

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Bengal (1). The report begins at page 124, but the page I refer to is 133. Phear, J., points out that "the plaintiff's right to maintenance had, by the death of her husband, become an actual charge on the estate in question before the cause of forfeiture had accrued. Her claim was an existing burden on the share which her sons took in those estates at the time that those shares were confiscated, and of course the Government took subject thereto;" and looking at the report of the case. I find that the forfeiture accrued in the year 1800, whereas Golab Koonwur had become a widow in 1786, some thirteen or fourteen years before, so that it may be fairly supposed that she had been receiving maintenance out of the estate, and it appears from the Privy Council judgment that the Government, as might be expected, did not think fit to object to her so receiving maintenance.

Then there are two cases from the reports of the High Court, North-Western Provinces, which are of great importance, because they bear directly upon the subject-matter, the parties there being also subject to the Mitakshara law. The first case is *Heeralal v. Mussamut Kousillah* (2). In this case, where the widow succeeded, it appears that the widow had asserted her right to maintenance and objected to the conveyance of the property, so that the purchaser had full notice of her claim, and he had even sought to defeat its operation by causing a stipulation to be inserted in the kabala, that Rs. 4 a month should be paid to the widow in satisfaction of that claim of her by the vendor. The Court accordingly very naturally held that this constituted a charge of which the purchaser had notice, and that it consequently was binding on the property in his hands, the stipulation as between vendor and purchaser of course not affecting the widow's rights, but it is noticeable that the Court observed that the decree ought to have been against the heir first, and failing him against the other defendant holding the property, and they altered the decree accordingly. Now it was contended in special appeal before us with reference to this case that, where the lien existed, notice was immaterial. I observe, however,

(1) 2 I. J., N. S., 124.

(2) 2 Agra H. C., 42.

that the learned Judges in deciding that case laid distinct stress upon the fact of notice, and it appears to me very reasonably. The other case from the North-Western Provinces is *Mussamut Goolabi v. Ramtuhai Rai* (1). In that case the converse decision took place. The learned Judges observe, speaking of the judgment of the Court below:—"Admitting the widow's right against her deceased husband's property, and that it avails, and is a charge on such property in the hands of a purchaser by private sale who buys from the descendants of the husband with notice of the widow's claim as has been decided in the case of *Heeralal v. Mussamut Kousillah* (2) (which I have just cited) in the Courts below, the Judge distinguishes the present case. The purchaser buying at a sale in execution of a decree bought the rights and interests of the judgment-debtor in the 2-anna share which was sold, and which the widow seeks to charge in his hands with her maintenance. At the time of the sale, and subsequently in a regular suit, the widow, who is now appellant, claimed one-half of the 2-anna share as her own property and put forward no claim to maintenance. There the learned Judges say:—"The special circumstances of the property which has thus been redeemed by the son after his father's death, and which the latter had never held except in its encumbered condition, and the conduct of the widow in asserting her right as proprietor to three-fourths of it, and making no mention of any claim on account of maintenance, are certainly distinguishing circumstances in the present case. The Judge held that a purchaser buying under such circumstances was justified in believing that no claim for maintenance would be advanced. The proprietary title relied on was wholly inconsistent with such a claim. We think his conclusion that the widow could not enforce her right against the purchaser is open to no legal objection, and his decree should be maintained;" so that, finding the purchaser to have bought the property under circumstances which did not lead him to suppose that any claim for maintenance would be advanced, they refuse to enforce that claim against the property in his hands.

Then a case was cited of *Varden Seth Sam v. Luckpatty Royjee*

(1) 1 All. H. C., 191.

(2) 2 Agra H. C., 42.

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Lallah (1). That was a case of an equitable mortgage, and their Lordships observe:—"The question to be considered is, whether the third and sixth defendants respectively possessed the land free from that lien, whatever its nature. As one who owns property subject to a charge can, in general, convey no title higher or more free than his own, it lies always on a succeeding owner to make out a case to defeat such prior charge. Let it be conceded that a purchaser for value *bonâ fide* and without notice of this charge, whether legal or equitable, would have had in these Courts an equity superior to that of the plaintiff, still such innocent purchase must be not merely asserted, but proved in the cause, and this case furnishes no such proof." Now upon that I think it may be observed, deferring entirely to what is stated by the Judicial Committee there, that the holder of a lien on specific property is in a different position from a person possessed of a right which is held to constitute a charge on the general estate of a deceased person. In the former case the innocent purchase has no doubt to be proved before the prior charge can be defeated. In the latter I should be inclined to hold that the purchaser must be affected with notice of the charge, and so the North-Western Provinces Court appears to have held.

Now, one of the arguments used by the Subordinate Judge in favor of his judgment is this:—He says: "As the plaintiff could lay claim against him into whose hands the property belonging to her husband first passed, so she can prefer a similar claim against the female defendant, as the said property has now passed into her hands." That argument seems to amount to this, that the suit against this purchaser is no more than a logical sequence of the first suit against the heir. But is that so? It appears to me there is a distinction, because the widow, in bringing her first suit against the heir, was in this position, that she had a claim for maintenance firstly against the estate of her deceased husband, nextly against her husband's relations. Now as against the Moharanee, the purchaser of this property, she had no personal claim whatever. Therefore, I think, there is no analogy between her claim in the two cases. It was a point of some importance

raised upon the defendant's answer, that the debts which led to the sale of this property were not entirely the debts of the present Rajah. That is a statement which at least is exceedingly probable, and if these debts were partly ancestral, I think it must be said that the widow's right to maintenance would be subject to the duty of paying those debts, that is, that her claim to maintenance would be upon the residue after paying such debts and would be regulated by the amount thereof, and the other claims to maintenance then valid. It is also as it seems to me a matter of doubt whether the widow by obtaining a definite personal decree against the Rajah did not modify the nature of her right so as to place herself in an inferior position as regards the lien over the property which she originally had. Why did she not, in bringing her first suit, have it declared that the maintenance which she claimed was a charge upon the husband's estates and amongst other things upon Killa Coojung? and this suggests a very cogent reason, as it seems to me, why the Court should not be ready to recognize such claims against purchasers of estates from Hindu heirs. The consequence of admitting such a claim as this would probably be to bring in a crowd of other claimants to the great peril of, and possibly fraud upon, the purchaser. From the statements made in the plaint, it seems pretty clear that this raj has changed hands several times in a comparatively short space of time. It seems that of the persons mentioned Junardon first became Rajah. On his demise, his son Lukshindur, succeeded. After his decease, the plaintiff's husband became Rajah, and after him came defendant No. 2, whose precise relationship is not clear, but who is spoken of as being the nephew of the plaintiff's husband. The result of that would be that there might easily be many Ranees all as widows having claims to maintenance upon this estate, of all which claims the purchaser would have no notice at all, and he might be overwhelmed with claims of that description. Again, the Subordinate Judge, when saying that it does not appear that any other ancestral property was in the hands of the Rajah defendant, quite omits to notice the claim which the plaintiff might have made against the surplus proceeds of this property when sold. Why did she not get those attached and obtain an

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order. for the payment of her maintenance thereout. There is nothing on the face of either of these decisions to show that the whole of the Rajah's estate has been sold, and considering that the plaintiff's first claim was undoubtedly upon the Rajah, it lay upon her to show that his estate has been exhausted before she could come upon the property in the hands of the first defendant. On all these grounds, it appears to me that the plaintiff's suit as against the Moharanee defendant was not good, that the judgments of the two Courts below were erroneous, and that those judgments ought to be reversed with costs.

Appeal allowed.

Before Mr. Justice Glover and Mr. Justice Mitter.

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Mar. 28.

ARFUNESSA (ONE OF THE DEFENDANTS) v. PEARY MOHUN MOOKERJEE (PLAINTIFF).*

Resumption, Suit for—Onus Probandi—Auction Purchaser.

Certain lands which had been let out in putni were, on default by the putni-dar in payment of rent, sold by auction under Reg. VIII of 1819 and purchased by *M* who granted them in putni to the plaintiff. In a suit for resumption on the allegation that the defendants were in possession of a portion of the lands as invalid lakhiraj by withholding payment of the māl rent thereof from after 1793, the defence was that the lands in dispute were valid rent-free lands existing, as such from before 1790. *Held* that, on the grounds of the decision of the Privy Council in *Harihar Mukopadhyaya v. Madab Chandra Babu* (1), the principle that the onus is on the plaintiff to show that the lands are māl applies to cases where the plaintiff, as in the present case, is the representative of an auction purchaser.

SUIT for establishment of māl right by resumption of certain lands which the plaintiff alleged were invalid rent-free lands. The lands in question were purchased by the Maharajah of Burdwan in 1862 at a Government revenue-sale, and let out in putni to Bani Madhub Bandopadhyaya, but on his default in payment of rent, they were sold by auction under Reg. VIII of

* Special Appeal, No. 992 of 1875, from a decision passed by the Subordinate Judge of East Burdwan, dated the 30th December 1874, modifying a decree of the Munsif of Kutwa, dated the 19th June 1873.

(1) 8 B. L. R., 566; S. C., 14 Moore's I. A., 152.

1819 and purchased by the Maharajah who granted them in putni to the plaintiff, and he alleging that the defendants were in possession of a portion of the lands as invalid rent-free lands by withholding payment of the māl rent thereof from after 1793, brought the present suit for resumption of the lands.

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The defence was that the lands in dispute were valid rent-free lands existing as such from before 1790: that the defendants had purchased them at auction-sales at various times, and that they had not made the lands lakhiraj by misappropriating the māl right. The Munsif held that the onus of proof was on the defendants, but that they had shown the lands to be rent-free, and he therefore dismissed the plaintiff's suit. On appeal, the Subordinate Judge confirmed that decision. Subsequently on review he allowed a portion of the plaintiff's claim, holding that the defendant had failed to establish his case with reference to it.

The defendant Arfunnessa appealed from the decision given on review, on the ground among others that the Courts below were wrong in throwing the burthen of proof on the defendants; and that the plaintiff must first prove his allegation that the lands were māl before the defendant could be called upon to show they were lakhiraj.

The arguments are sufficiently stated in the judgment of Mitter, J.

Baboo *Shamlal Mitter* and Baboo *Annund Gopal Palit* for the appellant.

Baboo *Aushotosh Mookerjee* for the respondent.

MITTER, J.—This was a suit for resumption of 7 bighas 15 chittacks of land held by the defendant under an alleged lakhiraj title. The plaintiff is the representative of an auction-purchaser, and the suit was commenced within twelve years from the date of auction-purchase. The plaintiff alleged that the land in suit appertained to the māl estate, and was held under the pretence of a lakhiraj title by withholding payment of māl rent only from a comparatively recent time. The defendant alleged that the lands in suit were valid lakhiraj. At first both

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the Courts below dismissed the plaintiff's suit, notwithstanding that they held that the onus of proof in such a case as this was upon the defendant. The lower Appellate Court, on an application of review having been made, has given to the plaintiff a decree for a portion of the land, holding that the defendant has failed to establish his case with reference to it. The defendant has preferred this special appeal against that decision.

The only question raised before us is that the lower Courts were wrong in throwing the burden of proof upon the defendant. We think this contention is valid, and is supported by a Full Bench decision of this Court—*Parbati Churn Mookerjee v. Raj Krishna Mookerjee* (1), and a decision of the Judicial Committee of the Privy Council in *Harihar Mukhopadhaya v. Madab Chandra Babu* (2).

The learned pleader for the respondent, on the other hand, contends that the Full Bench decision quoted above does not apply to this case, because the plaintiff represents an auction-purchaser, and it has been so decided by this Court in three cases—*Forbes v. Sheikh Meen Jan* (3), *Shamlal Ghose v. Sekunder Khan* (4), and *Nobolal Khan v. Adheranee Narain Koonwaree* (5). The first two cases fully support his argument, and it can be inferred from the report of the third case, that the learned Judges, who admitted the application of review referred to in it, were also of that opinion.

But we think that the question before us has been conclusively set at rest by the Privy Council judgment referred to above. Although from the report of that case it does not appear whether the plaintiffs there any way represented auction-purchasers for Government revenue or not, yet an examination of the grounds upon which it is based shows that its principle is applicable to cases of ordinary nature as well as of auction-purchases.

In the first part of the decision the remarks of the Judicial Committee who passed it proceed to examine the provisions of the Regulations bearing upon the question, and the result according to that examination was that suits for resumption of

(1) B. L. R., Sup. Vol., 162.

(3) 3 W. R., 69.

(2) 8 B. L. R., 566; S. C., 14 Moore's

(4) 3 W. R., 182.

I. A., 152.

(5) 5 W. R., 191.

invalid lakhiraj lands that existed at the time of the permanent settlement were dealt with under the provisions of a special and exceptional Regulation, viz., Reg. II of 1819. In such suits there is a presumption in favor of the plaintiff arising out of the declaration made in the Regulations that "the ruling power" was entitled *primâ facie* "to a certain proportion of the produce of every *biga*," that in these exceptional cases the defendant has generally to support the burthen of proof.

"The invocation of the 30th section of Reg. II of 1819" they observe "is not mere matter of form to be rejected as surplusage. The effect of it is to cause the case to be tried according to the procedure and presumptions prescribed by that enactment and the enactments in *pari materid* greatly to the advantage of the plaintiff and consequently to the prejudice of the defendant" (1).

This was not a suit under the 30th section of Reg. II of 1819, and in fact by the provisions of s. 14 of Act XIV of 1859 (which provisions have been re-enacted in the present Limitation Act), such a suit now cannot be maintained with success. Because once you admit that the lakhiraj tenure existed at the time of the permanent settlement, and this must be admitted to bring the case within Reg. II of 1819, you are hopelessly barred. Therefore the presumption which arises in such suits in favor of the plaintiff, and which relieves him from any burthen of proof further than to establish that the land in suit is within the ambit of his estate, does not arise in favor of the plaintiff in this case by reason of the special provisions of the lakhiraj regulation mentioned above. Then let us see whether that presumption avails the plaintiff in any way in a suit like the present which was brought upon the allegation, that the lands sought to be resumed did not form any existing lakhiraj tenure at the time of the permanent settlement, but were assessed with revenue and constituted a part of his *mâl* estate. The presumption in question carries the plaintiff's case no further than this, that every *biga* of land, within the ambit of his estate under the provisions of the lakhiraj regulation, was liable to be assessed with Government revenue, and the

(1) 8 B. L. R., 578; and 14 Moore's I. A., 172.

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title to especial exemption must be made out by the party setting it up. But this is not sufficient to start a case for the plaintiff in a suit of the present description, because there is no presumption that every biga of land within the ambit of an estate must be deemed to have been assessed with revenue until the contrary is proved. The following passage from the Privy Council report referred to above shows that it is upon this ground that the Judicial Committee have held that the burthen of proof in these cases is upon the plaintiff.

"Again their Lordships think that no just exception can be taken to the ruling of the High Court, touching the burthen of proof, which in such cases the plaintiff has to support. If this class of cases is taken out of the special and exceptional regulation concerning resumption suits, it follows that it lies upon the plaintiff to prove a *prima facie* case. His case is that his māl land has since 1790 been converted into lakhiraj. He is surely bound to give some evidence that his land was once māl" (1).

Then further on they observe "Mr. Doyne argued that the defendants had admitted that the lands in question were within the appellants's estate. But such an admission is obviously not sufficient to meet the burthen of proof thrown upon the plaintiff. It was at most an admission that the lands were within the ambit of the estate, not that they had ever been māl lands."

Now these are the grounds upon which their Lordships of the Judicial Committee have held that the burthen of proof is upon the plaintiff, and unless we hold that in the case of an auction-purchaser as soon as it is proved that a particular plot of land is within the ambit of his estate, there arises a presumption in his favor that it was assessed with revenue at the time of the permanent settlement, there seems to be no valid reason why we should hold that the grounds are not applicable to the present case. Therefore, notwithstanding the decisions of *Forbes v. Sheikh Meanjan* (2), *Shamlal Ghose v. Sekunder Khan* (3) and *Nobolal Khan v. Adheranee Nurain Koonwaree* (4) cited on behalf of the respondent, we must hold on the authority of the

(1) 8 B. L. R., 579; and 14 Moore's I. A., 173, 174.

(2) 3 W. R., 69.

(3) 3 W. R., 182.

(4) 5 W. R., 191.

Privy Council decision quoted above that the lower Courts have erred in relieving the plaintiff from the burthen of proof which ordinarily falls upon him. How far has the plaintiff been able to discharge that burthen it is not for us in special appeal to decide. We must, therefore, reverse the decree of the lower Appellate Court so far as it is favorable to the plaintiff, and remand the case to that Court for re-trial as regards the particular portion of the claim which was decreed in his favor. Costs to abide the result.

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GLOVER, J.—I concur in this judgment, and, in doing so, I do not forget that I at one time held a different opinion.

Appeal allowed.

Before Mr. Justice Birch and Mr. Justice Morris.

IN THE MATTER OF THE PETITION OF SOORJA KANT ACHARJ
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1876
April 4.

Appeal—Reg. VIII of 1819, s. 6—24 & 25 Vict., c. 104, s. 15.

There is no appeal from an order made by the Civil Court under s. 6 of Regulation VIII of 1819.

Per BIRCH, J.—A party who has preferred an appeal to the High Court when the law gave him no right of appeal, is not entitled upon the hearing to ask the Court to treat it as an application for the exercise of its extraordinary jurisdiction under s. 15 of 24 & 25 Vict., c. 104.

THE appellants in this case were the owners and zemindars of an estate called Shershabad. The respondent, having acquired by purchase a putni tenure within this estate, applied to the zemindars to give effect to the transfer by registration of his name in the zemindari serishtah or office, but being refused made an application to the Civil Court of the district where the property was situated, under the provisions of s. 6, Regulation VIII of 1819. The District Judge, upon such application, issued the order, from which the present appeal was brought, directing the zemindars to give effect to the

* Miscellaneous Regular Appeal, No. 367 of 1875, against the order of the Officiating Judge of Zilla Dinagepore, dated the 14th of August 1875.

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transfer without delay in accordance with the law. The Judge's order was drawn as follows:—"For the above reasons this case is decreed in favor of applicant. An injunction will issue on the zemindar under s. 6, Regulation VIII of 1819, to accept the security tendered, and give effect to the transfer without delay."

The zemindars appealed to the High Court from the above order.

Baboo Jadub Chunder Seal for the appellants.

Baboos Mohinee Mohun Roy and Golap Chunder Sircar for the respondent.

The arguments are sufficiently set forth in the judgment of the Court, which was delivered by

BIRCH, J.—This appeal is preferred against a summary order of the District Judge passed under s. 6 of Regulation VIII of 1819, directing the zemindar to accept the security tendered, and to give effect to the transfer without delay.

A preliminary objection has been raised that no appeal lies to this Court from such an order; and we are of opinion that the objection must prevail. The pleader for the appellant has been unable to show us any law which authorizes an appeal from an order under s. 6. His argument is that an appeal lies, because the Judge has used the word 'decreed,' and has drawn up an order in the form of a decree directing that an injunction should issue. We think that the fact of the Judge having dealt with the application in this manner does not entitle the appellant to come up here in appeal when the law does not provide for an appeal from an order passed under s. 6 of Regulation VIII of 1819.

It is then urged by the appellant's pleader that if we are against him on this point, we should still, under the circumstances of this case, exercise the extraordinary powers vested in this Court by s. 15 of the Charter Act.

Speaking for myself I must say that it is not in my opinion open to parties, when they find that they have adopted a wrong

course and filed an appeal when no appeal is allowed by law, to turn round and say that the Court is bound to exercise its extraordinary jurisdiction. Upon this application, as to whether there may be grounds for interference under s. 15 or not, I pronounce no opinion. All that I say is that I decline to treat this petition of appeal as an application to us to exercise our extraordinary powers under s. 15.

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Appeal dismissed.

Before Mr. Justice Markby and Mr. Justice Miller.

FUTEER PAROOWE (ONE OF THE DEFENDANTS) v. MOHENDER
NATH MOZOOMDAR (PLAINTIFF).*

1876

April 10.

Costs—Special Appeal—Order in Discretion of Lower Court.

Where, in a suit for defamation, a decree was given for the plaintiff for nominal damages, but he was ordered to pay the defendant's costs, *held*, that the order as to costs was in the discretion of the Court below, and therefore no special appeal would lie from such order: the rule as laid down in *Gridhari Lal Roy v. Sunder Bibi* (1) being that an order as to costs cannot be interfered with in special appeal unless it is illegal.

Semle—When the Court is of opinion that the plaintiff is not entitled to any substantial damages, it is not bound to award him nominal damages.

SUIT for Rs. 100 as damages for defamation. The plaintiff had previously instituted proceedings for criminal trespass in respect of the same matter in the Criminal Court against the defendants, which led to their being convicted and fined Rs. 5 each. The Munsif found that, under the circumstances, the plaintiff was entitled to damages, and assessed the amount at Rs. 15. He gave the plaintiff a decree for this amount with costs. On appeal by the defendants the Judge was of opinion that "as the plaintiff had already prosecuted the defendants criminally, and they had been fined to such an extent as the Magistrate thought proper, the present suit, although not contrary to law, was clearly a vexatious one, and the plaintiff ought not to

* Appeal under s. 15 of the Letters Patent of 1875, against decree of Birch, J., dated the 20th of August 1875, in Special Appeal No. 2756 of 1874.

(1) B. L. R., Sup. Vol., 496.

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recover more than nominal damages." He, therefore, modified the decree of the Munsif by giving the plaintiff a decree for four annas as damages, and ordered him to pay all the costs both in the lower Court and on appeal.

The plaintiff preferred a special appeal to the High Court from this decision, on the grounds that it was erroneous in law in holding him entitled to only nominal damages; that the defendants ought to have been ordered to pay the costs of the suit; or that at any rate the plaintiff ought not to have been ordered to pay the defendants' costs.

It appeared that the costs would amount to about Rs. 21.

The appeal came before Birch, J., who held that as it was a special appeal he could not go into the evidence to see whether or not the Judge came to an erroneous finding on the facts, but being of opinion that the costs had been awarded on an erroneous principle, he modified the decree appealed from by giving the plaintiff the costs in both the lower Courts, and ordered the defendants to pay the costs of the special appeal.

The defendant Futeck Parooee appealed under s. 15 of the Letters Patent on the ground that the special appeal having failed in every other respect, the order of the District Judge in respect of costs ought not to have been set aside, and that such order having been in the discretion of the District Judge, it could not have been set aside in special appeal unless it was an illegal order.

Baboo *Aushootosh Mookerjee* for the appellant.

Baboo *Hemchunder Banerjee* and *Umakally Mookerjee* for the respondent.

The contentions and the cases cited appear in the judgment of the Court, which was delivered by

MARKBY, J.—This was a suit to recover damages for defamation. The matter had already been the subject of criminal proceedings. The Subordinate Judge gave the plaintiff a decree for nominal damages; but being of opinion that the suit was a vexatious one, directed the plaintiff to pay the costs of the litigation.

The case having come up to this Court on special appeal, Mr. Justice Birch was of opinion that there was no ground upon which he could interfere with the decree for nominal damages, but being of opinion that the plaintiff ought not to have been made to pay the costs of the suit set aside the order of the Subordinate Judge as to costs, and directed that the plaintiff should recover the costs of the litigation.

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It is contended before us that, in special appeal, this Court cannot interfere with the discretion of the Courts below as to costs: and that in this case the award of costs to the defendant notwithstanding that the plaintiff obtained a decree for nominal damages, was within the discretion of the Court below.

Upon the first point we are of opinion that the question is concluded by the decision of the Full Bench in *Gridhari Lal Roy v. Sundar Bibi* (1). It was there laid down that this Court could, in regular appeal, review the exercise of the discretion of the lower Court as to award of costs; but that in special appeal this Court could not interfere unless the order made as to costs was illegal. We have no reason to doubt that this rule, which has also been approved in Bombay in *Amirsabeh Hafizulla v. Jamshedji Rustam* (2), has been since generally acted on in this Court. The only instances in which there is any apparent departure from it are in the cases of *Mussamut Bibee Moseekun v. Mussamut Bibee Munoorun* (3) and *Ooma Churn v. Grish Chunder Banerjee* (4), but the Full Bench decision does not seem to have been there referred to, and we have no reason to suppose that the learned Judges intended to question a rule thus authoritatively laid down. We may also observe that the attention of Mr. Justice Birch was not called to the Full Bench decision when the present case was before him. On the other hand, quite recently, a Judge of this Court, acting on the Full Bench decision refused to review in special appeal the discretion of the Court below as to costs.

(1) B. L. R., Sup. Vol., 496.

(2) 4 Bom. H. C., A. C., 41, followed in *Desaji Lakhmaji v. Bhavanidas Narotamdas*, 8 Bom. H. C., A. C., 100; but the opposite view was taken

by the Madras High Court in *Sri Dantuluri Narayana Gajapati Razu Garu v. Surappa Razu*, 3 Mad. H. C., 113.

(3) 24 W. R., 69.

(4) 25 W. R., 22.

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We think that we ought to follow the Full Bench decision, and to hold that a special appeal will not lie against any order as to costs, which it was within the discretion of the lower Courts to make. It, therefore, remains to consider whether, when a decree had been given for nominal damages, the Court had a discretion to award costs to the defendant. We are of opinion that it had. The Court below thought that though the words complained of had been spoken, the plaintiff was not entitled to any damages, and that to bring this suit after criminal proceedings had been taken in the same matter was vexatious. In substance, therefore, the defendant succeeded in the Court below. Perhaps it would have been better under these circumstances to have dismissed the suit altogether, the Court in such a case not being bound to award nominal damages. But we are not aware of any law which prevents the Court, if it thinks that the suit is a vexatious one, and that no damage has really been sustained, from giving nominal damages to the plaintiff, and awarding costs to the defendant. The words of s. 187 leave the discretion of the Courts as to costs wholly unlimited, and it would be impossible to say that such an award of costs was illegal.

We, therefore, reverse the order of Mr. Justice Birch, and dismiss the special appeal.

Appeal allowed.

ORIGINAL CIVIL.

Before Mr. Justice Pontifex.

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July 7.

SUTTYA GHOSAL v. SUTTYANUND GHOSAL AND OTHERS.

Majority Act (IX of 1875), s. 3—Minor—Guardian ad litem.

The appointment of a guardian *ad litem* is sufficient to make the minor party subject to s. 3, Act IX of 1875 and to constitute his period of majority at 21, at any rate so far as relates to the property in suit, notwithstanding that such minor would but for such appointment have attained majority at 18.

By the decree in this suit, which was brought in 1871 for partition of the estate of Raja Kallysunkur Ghosal, deceased,

it was, amongst other things, declared that Bosoomutty Dabee, one of the defendants in the suit, was entitled to a certain share in the estate; and that a monthly sum of Rs. 425 should be paid to her husband for her maintenance and support; and Raja Suttayanund Ghosal and Cowar Suttayakrishna Ghosal were appointed receivers in the suit. At the institution of the suit Bosoomutty Dabee was an infant, and her husband was appointed by the Court her guardian *ad litem*. The present application was made by her husband and guardian on her behalf for an order that the receiver should pay to him as her guardian the sum of Rs. 4,000 out of her share of the estate to meet extra expenses which had been incurred for Bosoomutty Dabee and her youngest son. Bosoomutty Dabee was, at the time of the application, of the age of 18 years and 2 months.

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Mr. *Bonnerjee* appeared in support of the application.

Mr. *Macrae* for the receivers.

Mr. *R. Allen* for Tarrasoondery Dabee, another defendant in the suit.

The application was consented to by all the parties to the suit, but the receivers were unwilling to pay the sum required to the husband, but were desirous that it, as well as the monthly sum allowed for her maintenance, should be paid to Bosoomutty Dabee herself, she having attained her majority.

Mr. *Bonnerjee* submitted that, under the Majority Act, IX of 1875, s. 3, Bosoomutty Dabee was still a minor, and remained so until she attained the age of 21 years.

Mr. *Macrae* contended that the words of s. 3 did not apply to a person for whom merely a guardian *ad litem* had been appointed, but only to guardians appointed under Act XL of 1858 and Act XXVII of 1860. The appointment of guardians under those Acts is very different from the appointment of a guardian *ad litem* in a suit such as the present. It could not have been the intention that a minor should be liable to the

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disqualification attaching to minority being prolonged by a temporary appointment like that of guardian *ad litem*, yet that might be the result of such an appointment in respect of a minor who would otherwise have attained majority at 18, but who notwithstanding the suit was finally determined would still remain a minor until 21.

PONTIFEX, J.—Act IX of 1875 was passed for the purpose of attaining greater certainty respecting the age of majority, but itself causes the uncertainty out of which this application arises. S. 3 of the Act is as follows :—“ Every minor of whose person or property a guardian has been or shall be appointed by any Court of Justice, and every minor under the jurisdiction of any Court of Wards, shall, notwithstanding anything contained in the Indian Succession Act, or in any other enactment, be deemed to have attained his majority when he shall have completed his age of 21 years, and not before.”

The suit in which this application is made was instituted before 1872, and when the present applicant was a minor under the age of 18 years. She was made a defendant to the suit, which was for partition. She was at the time a married woman, and her husband, who would have been her natural guardian, was appointed by this Court her guardian *ad litem*. By the decree in the suit it was, amongst other things, ordered, that Rs. 425 out of her share of the income of the estate, which was the subject of the suit, should be paid monthly to her husband as her guardian. The lady having now attained the age of 18, applies for the payment to her in future of the said Rs. 425 and for a sum of Rs. 4,000 out of the accumulations of her share of the minor. The question arises whether she is still a minor. In my opinion she is, for the decree in the suit made her a ward of Court, and I think the appointment by the Court of her husband as guardian *ad litem* was sufficient to bring her within s. 3 of the Majority Act, 1875, at all events so far as relates to the property in suit. I shall, however, order the sum of Rs. 4,000 now applied for and the future maintenance to be paid to her personally, as her guardian consents to such payments being made. The receiver will get his costs, and

the infant's costs will be paid out of her share of the estate.
Mr. Allen's client's costs will be paid out of her share.

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Attorney for the applicant: Baboo *Joykissen Gangooly*.

Attorneys for Tarrasoondery Dabee: Messrs. *Swinhoe, Law & Co.*

Attorney for the Receivers: Mr. *Carruthers*.

PRIVY COUNCIL

SONET KOOER (PLAINTIFF) *v.* HIMMUT BAHADOOR AND
OTHERS (DEFENDANTS).

P. C.*

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Feb'y. 11.

[On appeal from the High Court of Judicature at Fort William in Bengal.]

*Istemrari Mokurrari Tenure—Death of Grantee without Heirs—Escheat—
Recognition of Tenancy.*

Lands belonging to a zemindari granted by the zemindar under an absolute hereditary mokurrari tenure, do not, on the death of the grantee without heirs, revert to the zemindar; nor does the zemindar, under such circumstances, take by escheat a tenure subordinate to and carved out of his zemindari.

Where there is a failure of heirs, the Crown, by the general prerogative, will take the property by escheat, subject to any trusts or charges affecting it; and there is nothing in the nature of a mokurrari tenure which should prevent the Crown from so taking it subject to the payment of the rent reserved under it.

The recognition by the owner of lands of the interest of parties in possession by the receipt of rent from them, constitutes a tenancy requiring to be determined by notice or otherwise before such parties can be treated as trespasser.

THIS was an appeal from a judgment and decree of a Division Bench of the Calcutta High Court (L. S. Jackson and Ainslie, JJ.), dated the 23rd May 1871, reversing a decree of the Subordinate Judge of Zilla Gya, dated the 30th March 1870.

* *Present*:—SIR J. W. COLVILLE, SIR B. PEACOCK, SIR M. E. SMITH, AND
SIR R. P. COLLIER.

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The material facts of the case were as follows :—

Modenarain Singh, Rajah of Tekaree, was proprietor of the Mouzah Prampore in the district of Gya. He was a Hindu, and had two Hindu wives, Ranee Sonet Koorer and Ranee Asmedh Koorer. Having had no children by either of these ladies, they on his death succeeded to his estate, which by arrangement between themselves they took in shares of $7\frac{1}{2}$ annas and $8\frac{1}{2}$ annas respectively.

By Buratee Begum, a Mahomedan woman living in his house, Modenarain Singh had a daughter, Shurfoonnissa, and also other children, named Ikbah Bahadoor, Himmut Bahadoor, and Bismillah Begum. Shurfoonnissa, the eldest of these children, was born on the 2nd Magh 1248 (January 1841). Six days after her birth, Modenarain Singh executed in her favor a mokurrari grant of the Mouzah Prampore, belonging to his zemindari, to be held by her as absolute (*moostakil*) mokurraridar from generation to generation, subject to the payment of a reserved rent of sicca rupees 301 by the year. Shurfoonnissa died very shortly after the creation of this tenure, but from the date of the grant, and subsequent to her death, rent at the reserved rate was received, and continued to be received, by Rajah Modenarain from Buratee Begum. On the death of Rajah Modenarain in the year 1857, similar payments continued to be made by Buratee Begum to the Ranees Sonet and Asmedh Koorer of their proportionate shares of the reserved rent; and on the death of Buratee Begum in the year 1860, rent continued to be paid in like manner by her surviving children down to the year 1865. But in the end of that year an attempt was made by the Ranees to put an end to the tenure by ousting Jodhun Singh, who was in possession of the Mouzah under a lease granted in 1862 by Ikbah Bahadoor. In the proceedings arising out of this attempt, the Ranees alleged that the mokurrari grant to Shurfoonnissa was for her life only, and that, on discovering her death, which they said did not take place until after that of Rajah Modenarain, they had entered into possession of the mouzah. The Magistrate of Gya finding that receipts had been granted by the Ranees for the mokurrari rent of the year 1865, and that possession was in fact held by Jodhun Singh, by an order passed under s. 318 of the

Code of Criminal Procedure, and dated the 7th February 1866, directed that the possession of Jodhun Singh should be maintained, and referred the Ranees to a civil suit.

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No further steps were taken by the Ranee Asmedh Koor, but on the 6th February 1869, Ranee Sonet Koor instituted the present suit, in which she made Jodhun Singh, Himmute Bahadoor, Bismillah Begum, and Mussamut Sahebzaadee Begum, the widow of Ikbah Bahadoor, defendants. In her plaint she set forth that the grant to Shurfoonnissa of Mouzah Pranpore was only for life; that Shurfoonnissa died without heirs in November 1857; that by her death, the plaintiff as taking a $7\frac{1}{2}$ annas share of her deceased husband's estate was entitled to possession of a proportionate share of the mouzah; that together with Ranee Asmedh Koor, after hearing of the death of Shurfoonnissa, she had held direct possession of the mouzah till dispossessed by the Magistrate's order of the 7th February 1866, from which date her cause of action arose. She accordingly claimed to recover from the defendants direct possession of $7\frac{1}{2}$ annas share of the Mouzah Pranpore.

The defendants pleaded that the plaintiff had never had direct possession of the mouzah after the death of Shurfoonnissa, which took place more than twelve years before the date of her suit, and that she was consequently barred by limitation; that the grant to Shurfoonnissa was hereditary, perpetual, and absolute, and did not on her death revert to the grantor or his representatives, but would pass on failure of nearer heirs to the Crown by escheat; that the right to recover possession, supposing it to have arisen to the zemindar on Shurfoonnissa's death, could not now be enforced, since the plaintiff's husband, and afterwards she herself, had acquiesced in the possession and enjoyment of the tenure by the defendants, from whom they had accepted payment of the reserved rent: and further that they (the defendants) were in possession as the lawful heirs of Shurfoonnissa.

The Subordinate Judge of Gya, in whose Court the suit was brought, gave judgment for the plaintiff. He found that the mokurrari grant to Shurfoonnissa was in perpetuity, and not merely for life; that Shurfoonnissa died early, and that

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subsequently to her death the defendants had been in possession on payment of rent. But he held that as Shurfoonnissa was illegitimate the defendants were not her heirs; that the zemindar on her death had a right to resume possession of the tenure which did not revert to the Crown by escheat, and that the zemindar's right was not lost by the acceptance of rent from the defendants, and was not barred by limitation.

The plaintiff's claim was accordingly decreed, but on appeal to the High Court the decree of the lower Court was reversed by the following judgment:—

“The lower Court has held that the grant to Shurfoonnissa was not merely for life, but in perpetuity. But inasmuch as she died childless, and in a recent decision of this Court—*Mussamut Shahabzadi Begum v. Mirza Himmud Bahadoor* (1)—it was held that in the circumstances of this family no right of inheritance under Imameah law vests in the surviving brother or sister, the subordinate Judge came to the conclusion that the grant had become inoperative, and that the grantor had a right to resume it. It was contended before him, that even supposing the defendants not to be rightful heirs, yet the plaintiff would have no right to resume the grant as the property would be liable to be taken by the ruling power as an escheat, and that so long as the party rightfully entitled abstained from pressing his claim, the defendants were entitled to retain possession undisturbed. This plea was overruled on the ground that the defendants in possession were mere trespassers, and that as the legal right to the property is either in the grantor or the Crown, the former, in the absence of any claim by the latter, is entitled to maintain the suit. The defendants also pleaded limitation but this plea was overruled.

“Mr. Kennedy, who appeared for the special appellants, stated that the main objection to the finding of the lower Court is in respect of that portion in which the Subordinate Judge lays down, that as the succession is vacant the grantor is entitled to re-enter. For the purposes of this appeal we may confine ourselves to this objection.

“The Court below holds that the mokurrari tenure was granted in perpetuity and not for life, and this finding has not been questioned by way of cross-appeal or under s. 348, Act VIII of 1859.

“The grant is made to Shurfoonnissa and her children from generation to generation, and in it she is described as absolute (*moostakil*) mokurraridar.

"Tenures created in these terms and not in any way limited by other special conditions are always treated as of the most absolute character, and are every day transferred both by private sale and in execution of decree. Had Shurfoonnissa conveyed the estate to another, the grantor could not have ousted the assignees. Supposing she had died leaving a husband and children, this estate would have descended according to the ordinary rules of Mahomedan law, and no change in the order of succession would have been caused by the use of the words 'to her children from generation to generation.' It is, at least, extremely doubtful, whether the grantor could have altered the course of descent established by law, if he had intended to do so. It is, however, sufficient to say that the terms of the grant are those ordinarily employed in creating an estate governed by those rules, and that if it had been the intention of the grantor to limit the grant in some other mode, he would have specifically stated this intention. In the absence of any words of limitation we cannot hold that the Rajah intended to create anything but an estate in perpetuity with absolute power to the grantee to deal with it as she thought proper, and that he never contemplated the possibility of failure of issue or intended to interfere with the ordinary course of descent.

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"It is hardly necessary to consider the conduct of Rajah Modenarain, which has been referred to as showing that he never thought that his grant was less than absolute; but it certainly was not in any way inconsistent with an intention to grant a mokurrari tenure without any reservation: he made no attempt to resume it on the death of his daughter, but allowed her mother to enjoy it, and it is admitted that up to 1272, seven years after his death, receipts for the reserved rent continued to be granted in the daughter's name, and the mokurrari tenure as originally established was treated as subsisting.

"There is a dispute as to the precise date of Shurfoonnissa's death, the direct evidence on this point on either side is unsatisfactory, but looking to the examination of the Ranees, there is no room to doubt that the plaintiff's case is false, and that in fact Shurfoonnissa died at an early age. We find that Buratee Begum lived within the Rajah's mansion at Tekaree, and that the particular apartment or building occupied by her stood between the apartments of the Ranees. Those ladies admit, that they knew of the existence of the three later born children, and used to see them about the house, but profess never to have set eyes on the eldest. Yet, if the statement in the plaint is true, Shurfoonnissa had attained the age of seventeen years before she died; and it is incredible

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that these ladies should have known nothing of her. It may not be established with certainty that Shurfoonnissa died on 10th Cheyt 1249, as alleged by defendants, but there can be no doubt that she died in the lifetime of her father, and not two months after him as alleged by plaintiff.

"As it appears to us that the plaintiff has altogether failed to show that any right to resume the grant on failure of issue was reserved to the grantor, we hold that the judgment of the Court below cannot be maintained. The plaintiff can succeed only on the strength of her own title, and not on the weakness of that of the defendants. She is bound to show that she was the party entitled to take the estate when it became vacant on the death of Shurfoonnissa before she can ask the Court to eject the defendants who are in possession.

"The Subordinate Judge seems to think that there is something in the nature of a mokurrari grant which renders it capable of resumption, if there be no known heir of the last holder; but no authority has been shown to support this opinion. It would hardly be contended that a man who makes a gift has a better title than a stranger to the thing given, if the donee after accepting and holding it for a time should abandon it. The Rajah created a certain estate, and impressed the stamp of perpetuity on it for the express purpose of making a free gift of it to his daughter, and the fact that she had to pay a certain rent, or in other words that the gift was of a part only of the profits of the land, does not make it anything less than a gift. He reserved to himself a certain right over the lands given, namely the right to receive a fixed rent, but he absolutely divested himself of any other right. The transfer of the property to a stranger in no way affects the right reserved, which attaches to the land in whosoever hands it may be, and is therefore at all times adequately secured. If the rent be not paid there are proper legal remedies, but resumption of the grant is not among these, where there is no express stipulation to that effect.

"We think that the plaintiff has failed to establish any title to resume the mokurrari grant, and therefore without entering into the other questions involved in this suit, we admit the appeal, and reversing the judgment of the Court below dismiss the plaintiff's suit with the costs of both Courts."

From this judgment the plaintiff appealed to Her Majesty in Council.

Mr. C. W. Arathoon for the appellant.—This mokurrari

tenure not being an independent estate, but being carved out of the larger estate of the zemindari of Tekaree, has no independent existence, and consequently reverts, on failure of heirs, to the zemindar, or escheats to him as the superior lord, rather than to the Crown. The grant was made for the maintenance of Shurfoonnissa and the heirs of her body. On her decease without heirs, the object of the grant failed, and the tenure merged into the larger original estate. The High Court were mistaken in supposing that in granting a mokurrari lease the zemindar had divested himself of all rights in the lands leased except the right to the reserved rent. The defendants were in the position of mere trespassers as against whom the heir of the grantor was entitled to possession. In support of his contentions he referred to Williams on Real Property, 7th edn., p. 116, and to the case of *Raja Rameswar Nath Sing v. Haralal Sing* (1).

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Mr. *Doyne* and Mr. *John Cutler* for the respondents.— Assuming that the respondents, who are the parties in possession, have no legal title, the appellant has failed to show any title in herself which would support her claim to resume the mouzah in dispute. According to the appellant this particular grant is to be taken as something wholly different from other mokurrari tenures, and is to be regarded as the creation of an estate tail with reversion to the original grantor in case the grantee should die without heirs of her body; and this view is supported by reference to the doctrines of the feudal law in England. But the English feudal law has no force in India, and there is no analogy between an English estate tail and an Indian mokurrari. The present grant was an absolute conveyance subject to the payment of the reserved rent. The estate taken by Shurfoonnissa might have been sold by her, and the purchaser would have taken the same estate subject to the same payment. Failure to pay the rent would not have operated to destroy the estate, since the only remedy of the zemindar would have been to cause it to be seized and sold to the highest bidder under the provisions of Act X of 1859.

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On the failure of nearer heirs the tenure did not revert to the grantor, but escheated to the Crown; see *Gridhari Lall Roy v. The Government of Bengal* (1). There is no authority for extending to the zemindar the right to take by escheat.

Assuming that on the death of Shurfoonnissa a right accrued to Rajah Modenarain to resume his grant, that right was abandoned by him, and the tenure of Buratee Begum and afterwards of the respondents was recognized and affirmed by acceptance of rent for a long period of years. Such acceptance amounted to a re-grant of the tenure to Buratee Begum and to the respondents.

Mr. *Arathoon* replied.

Their Lordships' judgment was delivered by

SIR J. W. COLVILLE.—The question raised by this appeal, though short, is somewhat novel, and there appears to be little positive authority upon it.

It appears that Rajah Modenarain Singh, being a Hindu zemindar, but having an illegitimate family by a Mahomedan lady domiciled in his house, granted the mokurrari in question in the name of one of the infant daughters of that family, Shurfoonnissa Begum. The grant was clearly intended to create an absolute and hereditary mokurrari tenure, inasmuch as it contains the essential words, "generation to generation," which in documents of that kind have always been considered to have that effect; and their Lordships do not find in the particular document any special terms which would distinguish it from a grant of an ordinary mokurrari istemrari tenure. It is clear on the evidence that Shurfoonnissa Begum died before her father, and not very long after the creation of the tenure; and farther, that after her death, the father during his life, and afterwards his widows, who, by the Hindu law, are his heirs, continued to receive the rent reserved from those in possession of the lands, the receipt for such rent being, with one exception, taken in the name of Shurfoonnissa, the original grantee, and in that exceptional case in the name of Buratee Begum,

her mother. One of the questions raised by Mr. Doyne is, what effect ought to be given to that reception of rent as a recognition of the tenure and an answer to the present claim to resume the lands included in it.

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From this receipt of rent after the death of Shurfoonnissa, which must have been well known in the family, an inference may undoubtedly be drawn that the zemindar either originally intended to make the grant for the benefit generally of his illegitimate family, or after the death of his daughter was willing that it should have that effect; and it is difficult to suppose that the widows were not for some time willing to act on some such view of the transaction. It is impossible, therefore, to treat the parties in possession as mere trespassers. The recognition of their interest by the receipt of rent from them would constitute some kind of tenancy requiring to be determined by notice or otherwise. Their Lordships, however, are not prepared to say that this circumstance is of itself sufficient to defeat the claim of the plaintiff in this suit. They think that the ground upon which the decision of the High Court is to be supported, if supported at all, is that the plaintiff in the suit is not the person who, assuming the parties in possession to have no legal title, is entitled to recover the land by the destruction of the tenure. That, of course, raises the question which the High Court has dealt with: namely, whether, on the death of Shurfoonnissa without heirs, the right to the possession of the land reverted to the original grantor, or whether the tenure on such a failure of heirs should be taken to have escheated to the Crown.

The doctrine of escheat to the Crown in the case of a vacant inheritance was much considered by this Court in the case of *The Collector of Masulipatam v. Caval Vencata Narainapa* (1). In that case the property in question was a zemindari. The last male zemindar had died, leaving a widow, who took a widow's estate, and upon her death there were no heirs of her husband to inherit the zemindari. The zemindar was, however, a Brahmin; and the point raised in the suit was that on that ground the estate was not subject to the law of

(1) 8 Moore's I. A., 500.

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escheat. This contention was founded on the text of Manu, which says :—" The property of a Brahmana shall never be taken by the King : this is fixed law ;" and also on a passage in Nareda, where it is said :—" If there be no heir of a Brahmana's wealth on his demise it must be given to a Brahmana, otherwise the King is tainted with sin." It seems to have been admitted in that case that the British Government had at least the same rights that the ruling power would have had under the Hindu law, the question being whether that limitation which the Hindu law was said to impose on the right of the Hindu Raja or King was to prevail against or fetter the rights of the Crown. Lord Justice Knight Bruce, delivering the judgment of this Committee, said :—" It appears to their Lordships that, according to Hindu law, the title of the King by escheat to the property of a Brahmin dying without heirs ought, as in any other case, to prevail against any claimant who cannot show a better title ; and that the only question that arises upon the authorities is whether Brahminical property so taken is in the hands of the King subject to a trust in favour of Brahmins." And in a subsequent passage of the judgment he went on to say :—" Their Lordships, however, are not satisfied that the Sudder Court was not in error when it treated the appellant's claim as wholly and merely determinable by Hindu law. They conceive that the title which he sets up may rest on grounds of general or universal law. The last owner of the property in question in this suit derived her title under an express grant from the Government to her husband, a Brahmin, whom she succeeded as heiress-at-law. If upon her death there had been any heirs of her husband, those heirs must have been ascertained by the principles of the Hindu law ; but by reason of the prevalence of a state of law in the mofussil, which renders the ascertainment of the heirs to take on the death of an owner of property a question substantially dependent on the status of that owner. Thus the property being originally, and remaining, alienable, might have passed by acts *inter vivos* in succession to British subject, to foreign European owner, to Armenian, to Jew, to Hindu, to Mahomedan, to Parsee, or to any other person, whatever

“his race, religion, or country. According to the law administered by the Provincial Courts of British India, on the death of any owner being absolute owner, any question touching the inheritance from him of his property is determinable in a manner personal to the last owner. This system is made the rule for Hindus and Mahomedans by positive Regulation: in other cases it rests upon the course of judicial decisions.” And the final conclusion of the Committee was this:—“Their Lordships’ opinion is in favor of the general right of the Crown to take by escheat the land of a Hindu subject, though a Brahmin, dying without heirs; and they think that the claim of the appellant to the zemindari in question (subject or not subject to a trust) ought to prevail, unless it has been absolutely, or to the extent of a valid and subsisting charge, defeated by the acts of the widow Lutchmedavamah in her lifetime. In the latter case the Government will of course be entitled to the property, subject to the charge.” In a subsequent case relating to the same estate, *Cavalry Vencata Narainapah v. The Collector of Masulipatam* (1), the question was between the Collector, representing the Government, and a person claiming to have a valid and subsisting charge by an act of the widow—a charge which the widow was competent to create; and it was held that the Government took subject to the charge, and the suit was dismissed, but without prejudice to the right of the Collector, as representing the Crown, to redeem the charge and recover the estate. The property, no doubt, in this case was a zemindari; but the decision seems to establish the principle, that where there is a failure of heirs, the Crown, by the general prerogative, will take the property by escheat, but will take it subject to any trusts or charges affecting it. There, therefore, seems to be nothing in the nature of the tenure which should prevent the Crown from so taking a mokurrari, subject to the payment of the rent reserved upon it.

It has been argued, however, that this mokurrari, not being an independent zemindari, but being carved out of a zemindari, stands upon a peculiar footing, and that, upon the failure of heirs, the zemindar takes by right of reversion, or, if not strictly

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(1) 11 Moore's I. A., 619.

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by right of reversion, that the tenure escheats to him as the superior lord rather than to the Crown. The mokurrari was clearly an absolute interest. It was also an alienable interest. It might have been seized and sold, as Mr. Doyne has shown, under Act X of 1859, even in a suit for rent. It could not have been forfeited for the non-payment of rent; for in such a case the zemindar could only have caused it to be seized, put up for sale, and sold to the highest bidder. It is, therefore, property which, like that in the case above cited, might have passed to any purchaser, whatever his nationality, or by whatever law he was to be governed. It cannot, their Lordships think, be successfully argued that, having so passed, the estate would have determined upon the death of Shurfoonnissa (supposing it had been sold in her lifetime) without heirs; for the grant contains no provision for the lessee of the estate created in such event. There seems, therefore, to be no ground for saying that the lands have reverted in the proper sense of the term to the zemindar; and the only question is, whether, on the failure of heirs of the last possessor, he is entitled to take a tenure subordinate to and carved out of his zemindari by escheat.

Their Lordships are of opinion that there is no authority upon which the power of taking by escheat can be attributed to the zemindar. The principles of English feudal law are clearly inapplicable to a Hindu zemindar. On the other hand, it is clear that, if the zemindar has not such a right, the general right of the Crown subsists, and must prevail.

On the whole, therefore, their Lordships think that the High Court have come to a correct conclusion in holding that, supposing the parties in possession have nothing but their possession to depend upon (a question on which their Lordships give no opinion), the superior title, under which alone they can be ousted from possession of the lands, is not in the zemindar or his representatives, but in the Crown. They will, therefore, humbly advise Her Majesty to affirm the decree under appeal, and to dismiss this appeal with costs.

Appeal dismissed.

Agent for the appellant: Mr. J. L. Wilson.

Agents for the respondents: Messrs. Barrow and Barton.

ORIGINAL CIVIL.

Before Mr. Justice Pontifer.

HEM CHUNDER CHUNDER v. FRANKRISTO CHUNDER.

1876
July 27.

Order on Receiver to sell—Attachment in Mofussil of Property in Hands of Receiver—Execution of decree.

By a decree of the High Court obtained by *D M* in November 1871 in a suit on a mortgage brought by him against *B C* and *P C*, it was ordered that the suit should be dismissed against *P C*; that the amount found due on the mortgage should be paid to *D M* by *B C*; that the mortgaged property, some of which was in Calcutta and some in the mofussil, should be sold in default of payment, and any deficiency should be made good by *B C*. The property in Calcutta was sold under the decree, and did not realize sufficient to satisfy the decree. *D M*, thereupon, in August 1873, obtained an order for the transfer of the decree to the Mofussil Court for execution: after the transfer *B C* died in December 1874, leaving a widow and an adopted son, his representatives, against whom the suit was revived. The decree, however, was returned to the High Court unexecuted.

In a suit for partition of the estate of *R C* deceased, brought by *P C* against *B C* in the High Court, a decree was made in February 1871 for an injunction to restrain *B C* from intermeddling with the estate or the accumulations, and for the appointment of the Receiver of the Court as Receiver, to whom all parties were to give up quiet possession. *B C* was in that suit declared entitled to a moiety of the property in suit.

Held, on application by *D M* to the High Court for an order that the Receiver should sell the right, title and interest of the widow and son of *B C* in the estate in his hands to satisfy the balance of his debt, that *D M* was entitled to an order that their interest should be attached in the hands of the Receiver, and that the Receiver should proceed to sell the same.

Property in the hands of the Receiver of the High Court cannot be proceeded against by attachment in the mofussil.

THIS was an application in this suit on notice on behalf of one Denonath Mitter for an order that the Registrar or the Receiver should sell the share of Roymoney Dossee and Hem Chunder Chunder in certain specified properties in the hands of the Receiver, of which a portion was in Calcutta and a portion in the mofussil, sufficient to pay the balance due to Denonath Mitter, in respect of a decree obtained by him, dated 29th

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November 1871, in a suit brought by him against Bissonath Chunder, since deceased, and Prankristo Chunder. That suit was one on a mortgage, and the decree contained, amongst other things, an order, that the suit should be dismissed against Prankristo Chunder, for payment of the sum found due on the mortgage with costs by Bissonath Chunder to Denonath Mitter, for sale of the mortgaged property on default of payment, and for payment by Bissonath of any deficiency in the sale-proceeds to pay the debt. A sum of about Rs. 30,000 was found due to the plaintiff, and, default having been made in payment thereof, the property in Calcutta was sold by the Registrar and realized Rs. 23,000, which sum, less commission, was paid to Denonath Mitter. In August 1873, Denonath petitioned the High Court for an order that the decree should be transferred to the Court of the 24-Pergannas for execution to obtain satisfaction of the balance. After it had been transferred, Bissonath died in December 1874, leaving Hem Chunder, his adopted son, and a widow, Roymoney Dossee, his representatives, against whom the suit was revived. The decree, however, was returned to the High Court unexecuted.

By a decree dated 13th February 1871 made in a suit brought by Prankristo Chunder against Bissonath Chunder and others for partition of the estate of Ramtonoo Chunder, deceased, an injunction was granted, restraining Bissonath Chunder from intermeddling with the estate of Ramtonoo or the accumulations thereof; the Receiver of the Court was appointed Receiver of the estate, and all parties ordered to give up quiet possession to him, and he had since been in possession thereof. Bissonath was, in that suit, declared entitled to a moiety of the estate in the hands of the Receiver, and Denonath Mitter not having been able to obtain satisfaction of the balance due to him from the estate of Bissonath made the present application to realize the same by sale by the Receiver of the right, title and interest of Hem Chunder and Roymoney in the property, or in so much thereof as would be sufficient to pay his debt.

Mr. *Kennedy*, in opposing the application, contended that the procedure laid down by Act VIII of 1859 was the proper and

only course which should have been adopted in this case. Under Act VIII there must be an attachment in the usual way of the property. That the property was in the hands of the Receiver is immaterial. It might have been attached in his hands. The present application is not one for attachment. There is no other way of attaching than under Act VIII. The application, therefore, cannot be granted in the form asked for.

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Mr. *Macrae* contended that the application was in proper form, and was one which the Court could grant. The proceeding by attachment was not one which was open to the applicant in this case, as the property was in the hands of the Receiver of this Court: there are cases to show that, when such is the case, no attachment can be obtained in a Mofussil Court. Such a proceeding would be a contempt of this Court.

PONTIFEX, J.—In this case before 1871 there was a suit for partition of the estate of Ramtonoo Chunder. In that suit Bissonath Chunder was a defendant. By a decree in that suit, dated the 13th of February 1871, the Receiver of the Court was appointed Receiver of the estate, and there was the usual order, restraining the defendants in that suit and persons claiming under them from intermeddling with the estate pending partition, and it was further ordered that quiet possession should be given to the Receiver. Bissonath Chunder has since died, and his representatives have been made parties to the suit.

Under these circumstances and while the Receiver is still undischarged, one Denonath Mitter, a judgment-creditor in a suit on a mortgage against Bissonath Chunder, now seeks satisfaction of his decree against Bissonath's share of the property under partition, and finds himself powerless to execute his decree against such share without the assistance of the Court, because the estate is in the hands of the Receiver. It is, therefore, absolutely necessary for him to come to this Court for assistance. It seems to me that unless I grant this application. Denonath Mitter will be unable to execute his decree against the property of Bissonath, so as to obtain satisfaction of his judgment-debt. He cannot proceed in the usual and ordinary way under Act VIII

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to attach and sell the property in the mofussil, because it is in the hands of the Receiver of this Court.

I will make an order that Bissonath's interest in the property in the hands of the Receiver must be considered as attached, and that the Receiver proceed to sell that interest, and for the purpose of carrying out the sale I will order Bissonath's representatives to join in any conveyance which may be necessary; the sale proceeds to be paid into Court in this suit to await the further orders of the Court.

Application granted.

Attorney for the applicant: Baboo Shamaldhone Dutt.

Attorney for Hem Chunder and Roymoney: Mr. Remfry.

APPELLATE CIVIL.

Before Mr. Justice Kemp and Mr. Justice Pontifer.

1876
Feb. 22.

LALLAH RAMESSHUR DOYAL SINGH (PLAINTIFF) v. LALLAH
BISSEN DOYAL AND ANOTHER (DEFENDANTS).*

*Damages, Suit for—Joint Undivided Proprietors—Revenue Sale—
Act XI of 1859.*

No suit for damages as between joint owners on undivided estates will lie, in consequence of the sale of the whole estate through the default of one or more of such owners in paying their shares of the Government revenue.

THIS suit was for damages, amounting to Rs. 10,478. The plaintiff alleged that he was the proprietor of a 4-anna share in a mokurrari right in certain mouzahs, appertaining to lot Mehal Hakimpore, Pergunnah Chowssa, Zilla Shahabad. He alleged that the parent estate Hakimpore was sold for arrears of Government revenue, owing to the neglect of his co-sharers in the mokurrari in paying up their quota of Government revenue. He further alleged that the entire 16 annas of the mouzah, which comprised the mokurrari, were let out in perpetual mokurrari by the Rajah of Buxar to Lallah Mewa Lal, the common

* Regular Appeal, No. 258 of 1874, against a decree of the Subordinate Judge of Zilla Shahabad, dated the 26th of June 1874.

ancestor of the parties to this suit, at a fixed annual jumma of Rs. 401; that after the death of the ancestor, both parties to this suit in right of inheritance were in possession of the mokurrari, and that the practice amongst the co-sharers was to pay their respective quotas of Government revenue to the Collector direct under an agreement with the superior landlord to that effect; that under this alleged arrangement between the co-sharers, the plaintiff had to pay a 4-anna share of the Government revenue,—the defendant No. 1 a 4-anna share,—and the defendant No. 2 an 8-anna share; that on the 28th of March 1872, being the last safe day for the payment of Government revenue, the plaintiff paid in his quota; but the defendants having neglected to pay their respective shares of the Government revenue, the parent estate, Mehal Hakimpore, was sold at auction for arrears of revenue, and the price paid was Rs. 50,000; and that the whole of the surplus sale proceeds, after deducting the Government revenue due up to the 28th of March 1872, had been taken out of Court by the superior malik, the zemindar. The plaintiff valued his suit and assessed his damages at the proper selling price of his 4-anna share in the mokurrari as prevalent in the Pergunnah in which the mokurrari was situated.

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The Subordinate Judge dismissed the suit, and the plaintiff appealed to the High Court.

Mr. *R. E. Twidale* and Baboo *Tarruck Nath Dutt* for the appellant.

Mr. *H. E. Mendes* and Baboo *Rashbeharry Ghose*, Baboo *Tarruck Nath Palit*, and Baboo *Kashy Kant Sen* for the respondents,

On the appeal coming on a preliminary objection was taken on behalf of the respondents, that no suit would lie between joint owners on undivided estates for damages sustained by the estate in consequence of the default of one or more of the co-proprietors in paying their share of the Government revenue, and the cases of *Odoit Roy v. Radha Pandey* (1) and *Gungapersaud Sahee v. Madhopersaud Sahee* (2) were referred to.

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Mr. *Twidale* for the appellant contended, that the words of the proviso added to s. 33 of Act XI of 1859 were large enough to justify the bringing of this suit.

The judgment of the Court was delivered by

KEMP, J. (who, after stating the facts as above, continued)—
In the case alluded to of *Odoit Roy v. Rudha Pandey* (1) Norman and Seton-Karr, JJ., held that a suit would not lie between joint owners on undivided estates for damages sustained by the whole estate in consequence of the default of one or more of the co-proprietors in paying their shares of the Government revenue. As already observed, this case followed a decision of the Sudder Court of 1857 in the case of *Gungapersaud Sahee v. Mudhopersaud Sahee* (2). We think that the rule laid down in those decisions is a proper one; and further we find that, under the provisions of Act XI of 1859, s. 40, the plaintiff could have protected his interests by having his mokurrari right registered. He, also under the said Act, could have paid in the Government revenue due on account of the shares of his co-proprietors in the mokurrari, and thus saved the estate from sale. We find, on turning to the kyefeut of the collectorate amlah, which was called for by the Collector at the time when Bissen Doyal Singh, the defendant No. 1, petitioned to be allowed to save the property from sale by paying the revenue due on the 28th March 1872, that the balance then due was a very small one, under Rs. 100. There was, therefore, no difficulty whatever in the plaintiff avoiding the sale by paying the sum then due on account of Government revenue. Following, therefore, the ruling in *Odoit Roy v. Rudha Pandey* (1) and that of the Sudder Dewany Adawlut of 1857 alluded to above, we dismiss the plaintiff's suit.

Then there is a further question for consideration, namely, whether the defendants are not entitled to their costs in this suit. A cross-appeal has been made to this Court on that point, and we think that the defendants ought to get their separate costs in this litigation.

(1) 7 W. R., 72.

(2) 13 S. D. A., 1244.

We dismiss the appeal of the plaintiff with costs, and modify the decree of the Court below to this extent that we decree costs to each of the two defendants in this case.

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Appeal dismissed.

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Mitter.

MANESSUR DASS AND ANOTHER (PLAINTIFFS) v. THE COLLECTOR AND MUNICIPAL COMMISSIONERS OF CHAPRA (DEFENDANTS).*

1876

June 28.

Beng. Act III of 1864, s. 33—Municipal Commissioners—Appeal against Assessment—Jurisdiction of Civil Court.

A suit to set aside an order made on an appeal under s. 33 of Bengal Act III of 1864 to the Municipal Commissioners against a rate assessment, and to reduce the tax levied by them under that Act, on the ground that they have tried the appeal in an improper way, and have exceeded their powers and acted contrary to the provisions of the Act, cannot be maintained in the Civil Courts. The decision of the Commissioners in such an appeal is absolutely final.

THIS suit was brought to reduce the chowkidari tax levied under Beng. Act III of 1864 on certain houses belonging to the plaintiffs, situated in Mohulla Doulutgunj, No. 27, in Perguna Manghi, which had been, in 1871, assessed at Rs. 144 a year, and had so continued until 1873, in which year the tax was raised to Rs. 216. The value of the houses had not, in the interval, increased, nor had any change of form been made. The plaintiffs preferred an appeal to the Municipal Commissioners against the enhancement, which was rejected by them on the 7th of July 1873, whereupon the plaintiffs brought this suit for the reduction of the tax, praying that necessary enquiries should be instituted, the state and value of the houses enquired into, and a decree passed in their favor by setting aside the orders of the Municipal Commissioners.

The contention of the defendant was, that the Civil Courts had not the power to set aside the orders of the Municipal

* Special Appeal No. 360 of 1865, against a decree of the Judge of Zilla Sarun, dated the 6th January 1875, reversing the decree of the Munsif of Chapra, dated the 5th January 1874.

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Commissioners regarding assessment of taxes under Beng. Act III of 1864; that the adjudication by the Municipal Commissioners upon the appeal made to them by the plaintiff was final; that the Municipal Commissioners being legally competent to modify or raise taxes, the action on their part in raising the tax on the plaintiffs' houses after consideration of the state and value of the houses and the means of the owners was right and legal.

The Munsif decided that ss. 25 and 26, Beng. Act III of 1864, furnishing a rule that assessments were to be made upon an estimated amount of annual rent at the rate of 7-8 per cent. per annum, and no other rule being given, the Municipal Commissioners, in having taken into consideration the means of the owners of the houses in fixing the rate, had acted contrary to and beyond the powers vested in them by that Act; and on the authority of *Brindabun Chunder Roy v. The Municipal Commissioners of Serampore* (1) held, that the Court had jurisdiction to entertain this suit, and ordered a reduction of Rs. 72 which had been imposed in the year 1873 and made without it being shown that any improvement or change of form in the houses had taken place or any special cause for enhancement existed. The Judge, on appeal, held, that, under s. 33, Beng. Act III of 1864, the Civil Court had not the power to entertain the suit, and reversed the decree of the Munsif.

From this decision of the Judge the plaintiffs appealed to the High Court.

Mr. *G. Gregory* for the appellants.

Mr. *Ingram* (with him *The Senior Government Pleader Baboo Unoda Persad Banerjee*) for the respondents.

The judgment of the Court was delivered, without calling on the respondents, by

GARTH, C.J.—We think there is no ground for this appeal, and speaking for myself I should be very sorry to think that there existed any doubt whatever about this question.

By the 26th section of Beng. Act III of 1864, the Municipal

(1) 19 W. R., 309.

Commissioners are empowered to impose certain rates on houses, buildings and lands, which rates are to be paid by the owners, and by the 27th section those rates are to be assessed according to what may be considered the fair annual value of the property.

When the valuation is completed, lists are to be made, showing the rates at which each property is assessed; and when the assessment is made for the first time or increased, a special notice is to be given to the owner and occupier, of the amount at which the property is assessed, and an appeal is then given against the assessment, which, by the terms of s. 33, is to be heard before not less than three of the Municipal Commissioners. If an appeal is not made against the assessment, the assessment itself is final. If an appeal is made against the assessment, the adjudication of the Commissioners upon that appeal is also final, and in order more effectually to secure the finality of the adjudication, there is a special provision in the same section, that no person shall contest any assessment in any other manner than by appeal as hereinbefore provided.

Now, in this case, the plaintiff is attempting, by means of a civil suit, to re-open the question of the assessment of his house, which has been heard on appeal, and decided by the Municipal Commissioners. It is said that the Commissioners have tried the appeal in an improper way, and that they have exceeded their powers and acted contrary to the provisions of the Act. But even supposing that they had, the Civil Court has no right to interfere. Some actions may, no doubt, be brought against the Commissioners for a great variety of acts which they may do under color of their statutory powers and under a mistaken view of their duties, but not an action of this kind. Their decision upon an appeal against a rate assessment is absolutely final. The appeal is dismissed with costs.

Appeal dismissed.

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ORIGINAL CIVIL.

Before Mr. Justice Markby.

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July 1.

MILLER v. THE ADMINISTRATOR-GENERAL OF BENGAL.

Succession Act (X of 1865), ss. 4 and 44—Husband and Wife—Parties with English Domicile married in India—Succession to Moveable Property.

H M, a British subject, having his domicile in England, married in Calcutta, in April 1866, *C*, a widow, who at the time of the marriage had also an English domicile. *C*, after her marriage with *H M*, became entitled as next-of-kin to shares in the moveable properties of her two sons by her former marriage: these shares were not realized nor reduced into possession by *C* during her life. *C* died in 1872, leaving her husband, but no lineal descendants. In March 1874, *H M* filed his petition in the Insolvent Court, and all his property vested in the Official Assignee. In April 1875, letters of administration of the estate and effects of *C* were, with the consent of *H M*, granted to the Administrator-General of Bengal, by whom the shares to which *C* became entitled as next-of-kin of her sons were realized. In a special case for the opinion of the Court under Ch. vii, Act VIII of 1859, *held*, that the domicile of the parties being in England, the English law was to be applied, and therefore the Official Assignee as assignee of the estate of *H M* was entitled to the whole fund realized by such shares in the hands of the Administrator-General.

S. 4 of the Succession Act does not apply in respect of the moveable property of persons not having an Indian domicile.

THIS was a special case stated for the opinion of the Court under Ch. VII of Act VIII of 1859, by the agreement of the Official Assignee and assignee of the estate and effects of one Howard Mark, an insolvent, as plaintiff, and the Administrator-General of Bengal, as defendant.

The facts as stated in the case were as follows:—

“On the 7th of April 1866, the said Howard Mark, a British-born subject, having his domicile in Great Britain, and not in India, intermarried with Caroline Augusta, the widow of one W. B. Harvey deceased. The said marriage took place in Calcutta. The said Caroline Augusta had previously to, and at the time of, her said marriage, a domicile in Great Britain,

and not in India, and such domicile continued down to the time of her death. Caroline Augusta Mark died in Bengal on the 30th of September 1872 intestate, leaving her surviving her husband the said Howard Mark, but no lineal descendants. Howard Mark, on the 2nd March 1874, filed his petition in the Court for the Relief of Insolvent Debtors at Calcutta, and his estate and effects became thereby vested in the plaintiff as the Official Assignee of the Court. Howard Mark died on the 28th February 1875. Caroline Augusta Mark, subsequently to her marriage with Howard Mark and before her death, became, on the respective deaths of W. B. B. Harvey and D. Harvey, her two sons by her marriage with her former husband W. B. Harvey, entitled to share in the respective estates of her two sons as one of their next-of-kin. The said shares were not realized or reduced into possession by her during her lifetime, nor by Howard Mark, but were realized by the Administrator-General under the letters of administration hereinafter mentioned. On the 11th of September 1875, letters of administration to the estate and effects of Caroline Augusta Mark were, with the consent of Howard Mark, granted by the High Court to the Administrator-General of Bengal, and there is now in the hands of the defendant as Administrator-General and administrator of the estate and effects of Caroline Augusta Mark a sum of Rs. 6,224-10-9, being the proceeds of the shares aforesaid."

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The question for the Court was whether, in the events that have happened, A. B. Miller, as assignee of the estate and effects of Howard Mark, was entitled to the whole of the said fund now in the hands of the Administrator-General of Bengal as administrator of the estate and effects of Caroline Augusta Mark.

Mr. *Kennedy* and Mr. *Ingram* for the Official Assignee.

Mr. *Evans* for the Administrator-General.

Mr. *Kennedy* contended that the Official Assignee was entitled to the whole fund. It is admitted by the Adminis-

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trator-General that the Official Assignee is entitled in any event to one-half. The wife was admittedly domiciled in England, not in India. Succession to her moveable property would be therefore regulated by the law of England by s. 5 of Act X of 1865, which would entitle the husband to the whole; the domicile being admitted, s. 19 of that Act does not apply. It is said that, by virtue of s. 4, the Administrator-General is entitled to the moveable property left by Mrs. Mark: but in such a case as this, where the parties were domiciled in England, s. 4 will not apply. That section is not dealing with right of succession to property; that question is dealt with later in the Act. It only deals with the creation of rights *inter vivos*. Rights arising out of marriage are regulated by the *lex loci contractus*, except in special cases. But the rights of the parties with respect to any moveable property are still governed by the law of the domicile: for instance, persons married in France, but domiciled in England, are not subject to the Code Napoleon. An exception is made by the Indian Legislature, but that exception is not the present case. The intention is clearly shown by s. 44, by which the 4th section is interpreted. If a person domiciled in England marry an Eurasian woman in India, the section would apparently apply; but how would the Courts in England deal with the wife in such a case suing in her own name on a promissory note made in England? it is doubtful whether such an action would be held to be maintainable; I mean irrespective of the Married Woman's Property Act. If an Eurasian went to England and married there, I think s. 4 would apply, but s. 44 would not, because marriage in India would not have occurred. MARKBY, J.—You mean s. 4 would apply here.] Yes, in the Courts here; the sections relating to marriage do not apply where the domicile is in England, see Story's Conflict of Laws, ss. 186, 193. S. 4 was not intended to apply to any one not domiciled in India; it was intended to leave persons domiciled elsewhere than in India in the position in which they were before, on marriage: see note to s. 44; see also s. 283 as to payment of debts.

By s. 5, succession to moveable property is to be regulated by the law of domicile; the right of the husband in the property

of his deceased wife is succession within the meaning of that section. In former times the Ordinary was absolutely entitled to the property of intestates, and was not liable to account to any one; subsequently the Ordinary was enabled to depute the administration to the "next and most lawful friend of the deceased" who was accountable to the Ordinary. But the Civil Courts had to obtain statutes to effect this; see 31 Edw. III., c. 11, and 21 Hen. VIII., c. 5, s. 3; see also 22 & 23 Car. II., c. 10, and 29 Car. II., c. 3, s. 25. The husband was entitled as administrator, not as next-of-kin: see also *Fortre v. Fortre* (1) and *Proudley v. Fielder* (2): these cases show that in any case the husband takes the property of the wife deceased as administrator. After the Statute of Distributions, it was expressly declared by 29 Car. II., c. 3, s. 25, that the husband's right to succeed to his wife's property should not be affected by the Statute of Distributions. If the husband died without taking out administration, the Courts would grant administration to the next-of-kin of the wife, but such administrators were regarded as trustees for the representatives of the husband—2 Wms. on Executors, 7th ed., 1488, and the case of *Humphrey v. Bullen* (3). [MARKBY, J.—Was that right of the husband the *jus mariti* or the *jus successionis*?] It was true succession: see 2 Wms. on Executors, 7th ed., 410, and Bacon's Abridgment, Title Executors and Administrators, F., page 479.

Mr. *Evans* for the Administrator-General.—S. 4 is not restricted to persons domiciled in India, nor is the Succession Act itself so limited; see the provisions as to making wills; it has never been contended that a person making a will in India would not be bound to make it according to the Indian Act; there is a difference, for instance, as to attesting a will, see s. 50. S. 225 shows another difference: administration is now always granted under the Succession Act in all cases. The argument on the other side would limit it to persons domiciled in India: then by what law are persons in India with an English domicile to have administration granted to them, or of their estates?

(1) 1 Showers, 327.

(2) 2 M. & K., 58.

(3) 1 Atkins, 458.

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The only limitation of s. 4 is in s. 331 of the Act which makes it inapplicable to any marriage made before 1866: see the preamble to the Married Woman's Property Act (III of 1874), and the last paragraph of s. 2, which show that the Legislature was of opinion that s. 4 was so largely applicable that if not restricted it would have applied to Hindus, Mahomedans, &c. Supposing the husband does not take by succession but by the *jus mariti*, then if s. 4 takes away the *jus mariti* in India, it would be doubtful whether s. 5 as to succession would be operative in all cases. It is submitted that s. 4 is of general application; the Act is a general law for the whole of British India. It is not subject to the law of domicile; it deals itself with the law of domicile. The only exception to it is by implication in s. 44. The framers of the Act appear to have been of opinion that there would be a difference in cases of marriage in India when one party was domiciled in England and one in India. Again, all persons would be entitled to have their marriage rights saved according to the law of the country in which they had their domicile: those would be saved just as much as those of persons domiciled in England. If the Legislature had intended it to be excepted they would have said so in express words, as they have in other cases, for instance, as to domicile. S. 44 is not sufficient to create a limitation by implication of a general section in a general Act.

As to the position of the husband, the correct view is laid down in Bacon's Abridgment, Title Executors and Administrators, F. 480. * If s. 4 does apply in this case, then it puts a stop to the principle which was the origin of the position of the husband. He must now get administration here under the Succession Act, in which there is no provision for him to convert the effects to his own use; he has to distribute them according to the Act. The position of the husband on his wife's death by English law was by virtue of his right during her life; but if these rights are taken away here by s. 4, his position cannot be the same.

Mr. Kennedy in reply.—“Succession” is applicable both to testamentary and intestate estates. The intention of the Succession Act is not to conflict with the law of domicile. As to a

married woman taking out letters of administration, see ss. 183 and 189: she needs the previous consent of her husband. Taking ss. 5 and 207 in connection, it would appear that, as to moveable property, the Court in India would be the Court of administration, but the succession would follow the law of the domicile. If two portions of a statute are inconsistent, the later section would prevail, as in wills a later clause would invalidate a preceding inconsistent one.

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Cur. adv. vult.

MARKBY, J. (after stating the facts, continued):—It is admitted between the parties that the Official Assignee as such Assignee is entitled to half of the said fund.

The argument before me has turned entirely upon the construction of the Succession Act, especially of s. 4, and it has been assumed throughout the argument that the questions which arise relate to moveable property. S. 4 of the Succession Act provides that “no person shall by marriage acquire any interest in the property of the person whom he or she marries, or become incapable of doing any act in respect of his or her own property, which he or she could have done if unmarried.” It is contended for the plaintiff, that that section must be read as if it had run thus: “No person having a British Indian domicile shall by marriage acquire, &c.” Mr. Evans for the defendant contends that the section governs every marriage in India. There has not been, as far as I am aware, any previous discussion as to the meaning of this section, and I must therefore be guided by the general frame and scope of the Act. In order fully to understand this, it seems to me necessary to consider, from a somewhat general point of view, how marriage in a foreign country affects the moveable property of the parties thereto.

Now what was the law before the Succession Act was passed? The law of India would not be easy to ascertain. It was probably the law of England, except so far as a personal law could be claimed by the members of any particular class; or some persons might say that there was no law of India—no *lex loci* at all. But it is not necessary now to inquire which of these

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two views is correct. It is more important to consider what was the law of Europe and America, for it is clear that the Succession Act was based upon the general principles current among persons of the Christian faith.

Now where, as in the present case, a man and woman having the same domicile marry during a temporary sojourn in a foreign country, and do not evince any intention to change their domicile, the law of all Christian countries is unanimous as to the interest which they acquire in the moveable property of each other. It is that interest which is given them by the law of the country wherein they are domiciled at the time of the marriage. Upon this point, all the authorities are, as far as I am aware, absolutely concurrent. This is in fact a branch of the more general proposition that moveables are always in contemplation of law supposed to be situate in the country where the owner has his or her domicile; and that principle can, in the present case, be applied without difficulty, because we are not embarrassed in the present case by any distinction between the domicile of the husband and the domicile of the wife, or by any change of domicile at or after the marriage. All these complications are avoided in the simple case which we are considering, I need only observe that the rule of law is not that moveables have no *situs*. They have a *situs*, but that *situs* is the domicile of the owner. This is, I believe, the true mode of stating the principle. The authorities in support of this proposition amongst the Civilians (as they are usually called) are innumerable; they will be found collected in Burge, on Colonial and Foreign Laws, Vol. I, p. 632, where also the American authorities are referred to. For the English law, I may refer to *Enohin v. Wylie* (1) and the remarks of Lord Westbury at page 15. He was there speaking of succession. But the rule is general; the rights which arise upon all occasions, whether upon marriage or succession, whether by the act of the parties or by the operation of law, are as to moveable property governed by the law of the domicile where, in contemplation of law, the moveables are situate.

It would, indeed, be unnecessary to insist upon this, which is

(1) 10 H. L. C., 1.

an elementary proposition, were it not that in the case of marriage, Story, by representing the disagreement amongst lawyers as to the incidents of marriage to be far more extensive than it really is, and by not separating those propositions upon which they are agreed from those upon which they are not agreed, has thrown the matter into some confusion. The subject of our present consideration is laid down by Story for discussion in s. 135 of the Conflict of Laws, and is taken up again in s. 143. In s. 144, he narrows it to the cases where there has been no change of domicile. But even here he appears to find himself unable to draw any certain conclusion whatsoever from the multitude of authorities which he proceeds to quote. The passage relied upon by Mr. Kennedy in his argument (s. 186) is only put forward by Story as the doctrine maintained in the State of Louisiana, which, Story thinks, would *probably* be adopted in other parts of America. This exaggeration of the difficulties of the subject is mischievous. There are difficulties and conflict, but not upon all points. The exact state of the authorities is far more clearly stated by Burge in the work already referred to (ch. vii, s. 8). It will be there seen that where there is no change of domicile, the conflict of authority is confined almost entirely to the question whether the *communio bonorum* operates upon property situate in a country where the law does not recognize that incident of marriage. But neither this controversy, nor any controversy of an analogous kind, arises as to moveable property where husband and wife have the same domicile. The difficulty lies in extending the marriage laws of a country beyond the limits of that country. But in the case under consideration, this difficulty does not arise, for as Pothier says (speaking both of moveables and immoveables): “Toutes ces choses qui ont une situation réelle ou feinte sont soujettis à la loi ou coutume du lieu ou elles sont situées ou censées d’être.” And further on, after describing what are moveables, he says; “Toutes ces choses suivent la personne à qui elles appartiennent, et sont par conséquent régies par la loi ou coutume qui régit cette personne, c’est à dire par celle du lieu de son domicile.” (Poth. Obl., ch. i, ss. 2, 23, 24.) Mr. Burge quotes a number of civilians to the same effect: the only shadow of a

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difference being whether this rule belongs to real law or to personal law; but the distinction, important as it is sometimes, for our present purpose need not be considered.

Bearing these plain and incontestable principles in mind, there is (as it appears to me) no difficulty in comprehending the frame and scope of the Succession Act. It was impossible in dealing with the rights which arise upon death to ignore the consideration of the rights which arise upon marriage. For the rights which arise upon marriage, only assume their real importance when the marriage tie is severed. And the first and most necessary thing to be done by the Succession Act in reference to marriage was to declare the *lex loci* of India as to the interest acquired upon marriage by the parties thereto in the property of each other. Until that was declared, no sound legislation could take place. This is done by the 4th section. That section contains the *lex loci* of India. And I may observe that it was placed exactly where it is placed now by the very learned persons who originally framed that Act. But it is not (as it appears to me) necessary, in order to prevent the operation of this section upon the moveable property of parties not having an Indian domicile to add any words to that section. It does not operate upon that property any more than the marriage laws of England operate upon the moveable property of parties not having an English domicile. The *lex loci* of India, like the *lex loci* of all other countries, is applicable to the immoveable property of foreigners sojourning but not domiciled here, but not to their moveable property. It was not necessary for the Legislature, when laying down the *lex loci*, to reserve in express terms a principle of law which is universally recognized. That this general principle was not intended to be disturbed is clearly shown by s. 44, which resolves in a particular way an old standing dispute as to the application of the principle. The preponderance of authority had been in favor of making the domicile of the husband, or at least that of the marriage, govern the rights of the parties where the domicile of the husband and wife were different. The Succession Act, where either of the parties has an Indian domicile, very reasonably submits all their rights both as to moveables and immoveables, to the territoria

law of India. To that extent the *jus gentium* or common law of nations, has been set aside or modified. From this point of view, it is easy to see why s. 4 and s. 44 are kept apart. The two sections deal with different subjects. The former declares the general *lex loci* of India; the second lays down a special rule to govern a particular case. It is not a modification of the *lex loci*, but a declaration of the law in a particular case.

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From this point of view, nothing remains for the decision of the present case but to apply to this property the law of England, where, in contemplation of law, the property is situate; and there is no dispute that by the law of England the husband would be entitled to the whole. Whether, this, strictly speaking, be *jure mariti* or *jurs successionis*, is immaterial. S. 283 merely repeats and applies to a particular case the rule of law to which I have referred, and it might, perhaps, have been better omitted from the Act as in the original draft in fact it was.

* I therefore consider that Howard Mark was entitled at his wife's death to the whole of the immoveable property of his wife, and that the funds, now in the hands of the defendant, belong entirely to the plaintiff as assignee of Mr. Mark's estate.

The plaintiff, therefore, as Official Assignee, is entitled to recover the same, and there will be the ordinary money-decree for the amount. The costs on scale No. 2 will be paid out of the estate.

Judgment for plaintiff.

Attorneys for the plaintiff: Messrs. *Dignum and Robinson.*

Attorneys for the defendant: Messrs. *Chauntrell, Knowles, and Roberts.*

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Pontifex.

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22, 23, & 27,
§ April 10.

SHAM CHURN AUDDY (PLAINTIFF) *v.* TARINEY CHURN
BANERJEE (DEFENDANT).

Easement—Prescription—User—Limitation Act (IX of 1871), s. 27.

In a suit for declaration of the plaintiff's right of way over a lane leading from a public road to a door in the plaintiff's house, which lane the defendant, who resided at the end of the lane, had obstructed so as to prevent access to the plaintiff's house, it appeared that the house in respect of which the easement was claimed belonged in 1855 to one *H C*, during the time of whose occupation there was user of the right of way over the lane to the door, until he had the door bricked up. In April 1865 the house was sold by *H C*, and in June 1867 was conveyed by the purchaser to the plaintiff. From the blocking up of the door until the plaintiff's purchase no user was proved. The suit was brought in June 1875, about a month after the erection by the defendant of the obstruction complained of. *Held*, both in the Court below and on appeal, that the owner of the dominant tenement having, with the intention of preventing the use of the way, created an obstruction of a permanent nature which rendered such use impossible, the way could not be said, during the continuance of such obstruction, to have "been openly enjoyed" within the meaning of s. 27 of Act IX of 1871, and that, accordingly, though there had been no interruption within the meaning of that section, a right to the way had not been established under the Act.

APPEAL from a decision of Phear, J., dated the 6th December 1875. The suit was brought on the 18th of June 1875.

The facts were sufficiently stated in the judgment appealed from, which was as follows:—

PHEAR, J.—This is, according to the terms of the plaint, a suit for the determination of the plaintiff's right of way over a blind lane leading out of Hiddaram Banerjee's Lane to the back door of, and to a privy in, the plaintiff's house No. 1, Mudden Dutt's Lane. The plaint goes on to say that the plaintiff is possessed of the House No. 1 Mudden Dutt's Lane, and is entitled to a right of way at all times of the year for himself and his servants from the said house to Hiddaram Banerjee's Lane and from Hiddaram Banerjee's Lane to the said house over a blind lane forming the eastern boundary of the said house; and the plaintiff complains that the defendant, on or

about the 28th June 1874, wrongfully obstructed the said way by building a wall in front of and blocking up the said back door; and on or about the 21st May 1875 by building a wall in front of and blocking up the said privy; and on or about the 6th June 1875 by building and partly completing a wall across and blocking up the entrance to the said blind lane. The easement which he thus claims and for obstruction of enjoyment of which he now brings this suit is specifically described as follows:—"To the east of the said house and premises and between the same and a house numbered 50, Hiddaram Banerjee's Lane, belonging jointly to the plaintiff and his brothers Roop Chund Auddy and Prem Chund Addy as members of a joint Hindu family, is a lane leading to the land and premises of the defendant hereinafter called the blind lane." The back entrance of the said "house No. 48, Hiddaram Banerjee's Lane, opened on to the said blind lane, and at the north-east corner of the said house was a privy an entrance to which also opened on to the said blind lane."

"For upwards of twenty years, the owners and occupiers of the said house and premises No. 48, Hiddaram Banerjee's Lane, were in the constant habit of passing from Hiddaram Banerjee's Lane over the said blind lane to the back door or entrance of the said house, and of repassing from the said door over the said blind lane to Hiddaram Banerjee's Lane, and their mehters have for the same period been in the constant habit of passing to and fro over the said lane for the purpose of clearing the said privy and carrying the nightsoil therefrom."

The plaintiff does not expressly say that the soil of the land belongs to the defendant; but he nowhere asserts for himself any proprietary to it or to any portion of it, and all he claims is an easement; and the defence is that the plaintiff is not entitled to that easement. It is thus incumbent on the plaintiff in the first place to establish his right. The only title to the easement which he puts forward is title acquired by user under s. 27 of Act IX of 1871. The words of the section are as follows,—“Where the access and use of light or air to and for any building has been peaceably enjoyed therewith as an easement and as of right without interruption and for twenty years, and

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where any way or watercourse, or the use of any water, or any other easement (whether affirmative or negative) has been peaceably and openly enjoyed by any person claiming title thereto as an easement and as of right without interruption and for twenty years, the right to such access and use of light or air, way, water-course, use of water, or other easement, shall be absolute and indefeasible."

"Each of the said periods of twenty years shall be taken to be a period ending within two years next before the institution of the suit wherein the claim to which such period relates is contested."

"*Explanation.*—Nothing is an interruption within the meaning of this section, unless where there is an actual discontinuance of the possession or enjoyment by reason of an obstruction by the act of some person other than the claimant, and unless such obstruction is submitted to or acquiesced in for one year after the claimant has notice thereof, and of the person making or authorizing the same to be made."

The enjoyment which the plaintiff seeks to prove by evidence in order to establish title under this section is certainly of a very imperfect character indeed.

He has only comparatively lately become owner of the premises to which the alleged easement is incidental. The history of the premises appears to be shortly this.

In 1855 one Haran Chunder acquired the property from the Sens. Ten years after, namely, on the 4th April 1865, the premises were purchased by Madhub Chunder Seal in the name of Kalee Churn Seal. On the 26th August 1866, Madhub Chunder Seal died, and in the following year, on the 26th June, his executors and Kalee Churn Seal conveyed to the plaintiff. But it appears so far as one can judge by the evidence given that the house which has gone through these transitions of ownership has not been occupied as a residence by any one for several years. The plaintiff himself has not resided in it, though he says he did for a time occupy a room of it for a special purpose, and in January 1871 he pulled down the old house, a greater portion of which had already fallen down, and built another on the site. It is to this new house that the plaintiff

says the easement is incidental by reason of s. 27 of the new Limitation Act. It seems to me that the evidence adduced by the plaintiff falls short of proving any enjoyment of the right for any portion of the period of twenty years. The words of the section are "has been peaceably enjoyed therewith as an easement and as of right without interruption and for twenty years." The plaintiff himself has given his evidence, but he could not possibly speak personally to the enjoyment of the right which constitutes the easement described in his plaint. The actual user in the case of one branch of the easement is by servants of the lowest class and mehters, and that of the other branch by a limited portion of a Hindu family. No single witness has been brought by the plaintiff who possesses the character of either the one set of persons or the other. No mehter or servant of any occupier of No. 1, Mudden Dutt's Lane; no members of any family, who have enjoyed occupation of the house, have been brought by him to depose to actual personal user, but a succession of almost worthless witnesses have been called to speak as spectators from a distance of the exercise of these rights by persons who have the specified status. I need hardly say this is not the way in which an attempt to burthen another man's estate under the section is to be proved. However what was defective in the plaintiff's case was supplied by the defendant. Two of the sons of Haran Chunder Chunder who had lived in the house for the ten years between 1855 and 1865, did speak to an enjoyment of such an easement as that described in the plaint by the then owner of the house their father in the persons of his servants and the members of his family, This does not, however, bring the enjoyment further than 1865 or thereabouts, and does not cover more than half the period which the plaintiff must make out in order to satisfy the requirements of the Act. The period must determine within two years immediately preceding the institution of the suit. It is on this argued by the plaintiff that, even if there be a gap, so far as the evidence goes, in the actual enjoyment of the easement, I mean if the enjoyment by actual user cannot be carried down to within two years of suit, still the ceaser of the enjoyment has been voluntary on the part of the owner of the premises

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or at any rate is not shown to be attributable to the act of any other person than the claimant. Therefore, within the terms of the explanation attached to s. 27, the actual enjoyment of the easement must be carried constructively down to the very time of bringing the suit. It seems to me by this argument that the "explanation" of the Act is somewhat strained. On the facts of the case I have no doubt whatever, that if there was an easement during the earlier part of Haran Chunder's possession of the house, it was entirely abandoned and was intentionally put an end to before he died, by the blocking up of the doors. The very measure of the easement is that afforded by the two doorways by which access to the land of the defendant is obtained, and the purpose for which the user of the land after access to it through those doors, is exercised; and it is, I think, impossible to doubt on the evidence of the two sons of Haran Chunder as well as the other witnesses in the case that Haran Chunder did in fact completely block up those two doors which gave access from his house to the defendant's land by bricks and mortar, and that the privy remained close, and the door shut up from that time onward. There is nothing in the evidence to indicate that these have been used since the time of Haran Chunder. When the privy was closed, and there was in fact no privy, and the doors were built up, there was no capacity on the part of Haran Chunder to enjoy the easement, the object and means which measured the easement were gone, and I think in that state of things no construction derived from the explanation of the section will enable me to say that the easement was being peaceably and openly enjoyed. I say nothing of what the effect of the abandonment might be *quâ* abandonment. It is probable in that sense it could not be materially operative unless something had been done by the defendant on the faith, of the abandonment which should make the abandonment a cause of estoppel against the plaintiff's preferring his claim. I give no decision on the point, and it is not necessary for me to do so, because I think the abandonment in the shape of effectually stopping up and putting an end to the means of

access to the land of the defendant had the effect of putting an end to the continuous enjoyment of the easement, whether actual or constructive.

This is not a question as to the continuous existence of a non-used right; but as to the continuity of user which is to establish or evidence a right, and it seems to me there cannot be, even constructively, *user* of a way to and for the purposes of a privy which does not exist, or limited to the back or servant's entrance of a house which has no such entrance. And therefore that the plaintiff has failed to make out the basis of his right which is necessary to satisfy s. 27 of the Limitation Act. This disposes of the case I think; but I may add that I am of opinion the plaintiff, by his own account, has failed to make out any easement to the privy on the north-east corner. No doubt an easement is not lost by a slight variation in the enjoyment of it, but the materiality of the variation must be judged of by consideration of the burthen on the servient owner. And the variation of burthen is very material, when a mehter's business is claimed to be carried from the north-east corner through the whole of the blind lane to the high way instead of from the middle of the blind lane to the same limit, *i.e.*, just half the distance. As the plaintiff has failed to establish the right claimed, his suit must be dismissed with costs.

From this decision, the plaintiff appealed on the following grounds:—"That in the case of a lane between two closes used as a way, the presumption is that the soil *ad medium filum vice* belongs to the owner of the land on each side, if the user has been as a road, and not in the exercise of a claim of ownership: that, under the circumstances, the onus of proof had been wrongly thrown on the plaintiff, whereas there was sufficient evidence to shift the burden on to the defendant; that the decision was against the weight of evidence, and the defence set up at the hearing totally different from that put forward in the written statement: and that there was ancient user proved, and no evidence of any interruption of the alleged right of way of the plaintiff or his predecessors by reason of any obstruction by the act of some person other than the claimant until within two years of the institution of the suit.

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Mr. *Piffard* and Mr. *Evans* for the appellant.

The *Advocate-General*, *offg.* (Mr. *Paul*) and Mr. *Bonnerjee* for the respondent.

The following cases were referred to in argument: *Moore v. Rawson* (1), *Bateman v. Bluck* (2), *Liggins v. Inge* (3), *Stokoe v. Singers* (4), *Lady Holland v. The Kensington Board of Works* (5), *Monmouth Canal Company v. Harford* (6), and *Bright v. Walker* (7).

The judgment of the Court was delivered by

GARTH, C. J.—This is a suit brought by the plaintiff for the purpose of establishing a right of way for himself and his servants from a public road called Hiddaram Banerjee's Lane over a piece of ground, which is called a blind lane, to a kirkee door and privy in the plaintiff's house.

The defendant, whose residence is situated at the end of the blind lane, has built up a wall, against the plaintiff's kirkee and privy doors, and also across the entrance from the blind lane to Hiddaram Banerjee's Lane, so as to prevent all access from Hiddaram Banerjee's Lane to the plaintiff's house.

It does not very clearly appear from the evidence to whom the land called the blind lane belongs. The plaintiff has made an attempt to claim one-half of it as his own, upon the ground, that as it was a road lying between his house and his neighbour's, the presumption of law was that he was entitled to the half of it, *usque ad medium filum* of the space between the two houses.

We think, however, that there is nothing in this point. The supposition that the plaintiff is the owner of the soil is quite inconsistent with the right of way, which he claims in his plaint. It is also inconsistent with the plaintiff's own title-deeds, which state the blind lane to be the boundary of his property ;

(1) 3 B. & C., 332.

(2) 18 Q. B., 870; 17 Jur., 386; 21 L. J., Q. B., 406.

(3) 7 Bing., 682.

(4) 8 E. & B., 31.

(5) L. R., 2 C. P., 565.

(6) 1 Cr. M. & R., 614.

(7) *Id.*, 211.

and lastly the presumption upon which the plaintiff founds his claim is only applicable to a highway and not to a private occupation road, such as the blind lane is alleged to be.

The only question in the case therefore is whether the plaintiff is entitled to the right of way which he claims in the plaint.

(After stating the facts, His Lordship continued):—

Upon this state of facts, the learned Judge in the Court below has decided, and we consider rightly, that the plaintiff has failed to establish a twenty years' user of the way which he claims within the meaning of the 27th section of the Limitation Act, and that the discontinuance of the user, which was caused by the bricking up of the wall, has had the effect of preventing the acquisition of the statutory right.

In the view which we have taken of the cases, we should have thought it unnecessary to do more than express our acquiescence in the judgment of the Court below and in the reasons for that judgment, were it not that in the argument before us, which has occupied a considerable time, some confusion appears to have arisen as to the construction of the 27th section, and the meaning of the terms "interruption," "abandonment," and "discontinuance" as applied to the present case.

There was here neither an "interruption" nor an "abandonment" (properly so called) of the easement claimed. The term "interruption" in s. 27 means an obstruction or prevention of the user of the easement by some person acting adversely to the persons who claims it. The expression is altogether inapplicable to any voluntary discontinuance of the user by the claimant himself. This is abundantly clear from the explanation given in the Act itself. The term "abandonment," on the other hand, as applied to easements, means generally the voluntary and permanent relinquishment by the dominant owner of a right which he has actually acquired. This will be found satisfactorily explained in *Gale on Easements* (2nd edition), p. 353, and in the judgment of the Court in *Moore v. Rawson* (1). In this sense there was no abandonment here, because the plaintiff's right was never actually acquired. It

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(1) 3 B. & C., 322.

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was only in course of acquisition by user at the time when the doors were bricked up.

“Discontinuance” more properly describes what occurred at that time: not a “discontinuance” by adverse obstruction, as the term is somewhat inappropriately used in the explanation to the 7th section, but such a voluntary discontinuance of the user of the easement as prevents the statutory right being acquired.

The reason why such a discontinuance of user defeats the right is, that no one can be said to be in the open enjoyment of an easement, who has purposely, and with the manifest intention of preventing the user of it, created some obstruction of a permanent character which renders the enjoyment of the easement, so long as the obstruction lasts, impossible. This is very different from the mere non-user for a time of an easement, which the owner might, if he pleased, enjoy during every hour of that time, but which for some good reason, he does not care to enjoy, as for instance, where the owner of a house ceases to use a way to it, because the house is for a time unoccupied, or where a farmer desists for a time from exercising a right of pasture, because he happens to have no pasturable cattle, or because by reason of drought or some other cause the herbage is scanty or unwholesome.

What the owner of the house has done in this case, is, to incapacitate himself by his own act from any possible use or enjoyment of the way in question: and it seems quite impossible to say, that during the time this incapacity continued he was openly enjoying the easement, and claiming right there-to within the meaning of the 27th section.

It was then suggested by the plaintiff's Counsel that, although the statutory right might not have been acquired, there was evidence in the case showing that the easement had been enjoyed for upwards of twenty years previously to the bricking up of the wall, and that the plaintiff was entitled to claim a right by prescription at common law, by asking the Court to presume an ancient grant in his favor. Upon looking into the case, however, it appears that the evidence in favor of any such prescriptive right is so slight as hardly to justify the Court

under any circumstances in finding for the plaintiff upon that ground, but in this case there are very cogent reasons for not admitting any claim upon this basis.

In the first place the plaintiff, in his plaint, distinctly founds his claim upon a twenty years' user, and in conducting his case in the Court below, it is admitted that he relied on no other ground than the statutory title.

The defendant therefore would very naturally abstain from cross-examining the plaintiff's witnesses, or adducing any evidence himself, except for the purpose of defeating the claim in the way, and the only way, the plaintiff sought to advance it, and he would now be placed in a very unfair position if we were to allow the plaintiff upon this ingenious suggestion now made for the first time to change his position altogether, and rest his case upon a point which was never contemplated by either of the parties in the Court below.

The Court are by no means disposed to encourage a contention of this kind, and the result is that we entirely agree with the judgment of the Court below, and dismiss the appeal with costs on scale No. 2.

Appeal dismissed.

Attorney for the appellant : Mr. *Leslie*.

Attorney for the respondent : Baboo *G. C. Chunder*.

APPELLATE CIVIL.

Before Mr. Justice Markby.

IN THE MATTER OF THE PETITION OF FEDA HOSSEIN AND OTHERS.*

Act VI of 1874 (*Privy Council Appeals Act*)—*Letters Patent*, 1862, cl. 39—24 § 25 *Vict.*, c. 104, s. 9—24 § 25 *Vict.*, c. 67 (*Indian Councils' Act*), s. 22—*Power of Indian Legislature*.

The provision in s. 5 of Act VI of 1874 that where there are concurrent decisions on facts, the case must, in order to give a right of appeal to the Privy Council, involve some substantial question of law, is not *ultra vires* of the power of the Indian Legislature as being a curtailment of the jurisdiction given to the High Courts by the Letters Patent, 1865, cl. 39.

* Privy Council Appeal, No. 15 of 1876, in Regular Appeal No. 238 of 1874.

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Clause 39 of the Letters Patent of 1865 does not rest for its authority on the 24 & 25 Vict., c. 104, and was not inserted in pursuance of that Act; consequently any power which it gives to admit an appeal to the Privy Council from a decision of the High Court on its Appellate Side, is not one of the powers which the High Court is, by the first part of s. 9 of 24 & 25 Vict., c. 104, commanded to exercise.

S. 22 of 24 & 25 Vict., c. 67, must be read with ss. 9 and 11 of 24 & 25 Vict., c. 104. By the express words of s. 9 all previously existing powers were reserved to the High Court provided the Letters Patent did not interfere with them, and as to these powers the Governor-General in Council is expressly empowered to legislate. Even if therefore the power to admit an appeal to the Privy Council were conferred by the Letters Patent, under the authority of 24 & 25 Vict., c. 104, it was, not being a new power, subject to the legislative control of the Governor-General in Council.

The *ratio decidendi* in *The Queen v. Meares* (1) dissented from.

Where there were two concurrent decisions on facts, an application to appeal to the Privy Council was refused, the right of appeal from a decision of the High Court on its Appellate Side, simply on the ground that the subject-matter of the suit was above Rs. 10,000 having been taken away by Act VI of 1874, s. 5.

APPLICATION by petition for admission of an appeal to the Privy Council, or to grant leave for such appeal (2), from a judgment of the High Court affirming a decision of the District Judge of Purneah.

The petitioner was the plaintiff, and his suit was dismissed in both Courts upon the merits.

The petition set forth that the value of the property involved in the suit exceeded Rs. 10,000; that though Act VI of 1874 passed by the Governor-General in Council provided among other things that "where the decree appealed from affirms the decision of the Court immediately below the Court passing such decree, the appeal must involve some substantial question of law," still, inasmuch as such provision was wholly unauthorized and beyond the competency of the Governor-General in Council to make, the petitioner was clearly entitled to the right of appeal

(1) 14 B. I. R., 106.

(2) The application was for admission of the appeal under the law in force before the passing of Act VI of 1874, on the ground that that Act was

ultra vires; or, in case the Court should consider the Act binding for leave to appeal under s. 5, on the ground that the suit was one involving a substantial question of law.

under the provisions of the Letters Patent; that in fact there were substantial questions of law involved in the suit; and that "considering the value of the property and complicated facts of the case and legal questions involved therein," leave should be granted to the petitioner, the case being a fit one for appeal to the Privy Council.

The application came on for argument on the 30th of June 1876.

Mr. *Kennedy* and Mr. *M. P. Gasper* (Mr. *R. T. Allan* with them) appeared in support of the petition.

Mr. *Woodroffe* and Mr. *Evans* (Mr. *Twidale* with them) appeared to oppose it.

Mr. *Kennedy*.—S. 5 of Act VI of 1874 (the Privy Council Appeals Act) has imposed a restriction on the right of parties to appeal to Her Majesty in Council, when the High Court or any other Court of final appellate jurisdiction affirms the decision of the Court immediately below. It declares by implication, that where there are concurrent decisions on facts, the case must involve some substantial question of law in order to give a right of appeal to the Privy Council. But cl. 39 of the Letters Patent of 1865 gives an appeal as of right to the Privy Council, provided the sum or matter at issue is of the amount or value of not less than Rs. 10,000. The restrictive enactment of the Governor-General in Council is *ultra vires*. The Council's Act (24 & 25 Vict., c. 67) was passed in the same Sessions as the Charter Act (24 & 25 Vict., c. 104). S. 22 of 24 & 25 Vict., c. 67, declares the power of the Governor-General in Council to make laws and Regulations "for all Courts of justice whatever," and at the same time provides that he shall have no authority to pass any law or Regulation which shall affect the provisions of any Act passed in the same Sessions with the Council's Act. S. 9 of 24 & 25 Vict., c. 102, provides that the High Courts established under the Act "shall have, and exercise all such civil, criminal, admiralty jurisdiction, original and appellate, and all such powers and authority for and in relation to the administration of justice

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in the Presidency for which it is established, as Her Majesty may by such Letters Patent as aforesaid direct and grant," and that the newly established Courts shall exercise all the powers possessed by the abolished Courts subject only to the provisions of the Letters Patent. The admission of an appeal to the Privy Council is a power "in relation to the administration of justice," and as the Letters Patent (cl. 39) give an appeal as of right in cases above a certain amount, the question consequently arises, had the Governor-General in Council the power to curtail the jurisdiction of the High Court to admit such appeals?

The Charter Act enacts that the High Courts shall have and exercise such jurisdiction as Her Majesty shall by Her Letters Patent appoint. It is true the details of the jurisdiction of the High Court are not contained in the statute itself. It merely authorises Her Majesty to define the jurisdiction, but it directs the Court to exercise that jurisdiction when it shall have been so defined. When, therefore, Her Majesty issued the Letters Patent, even if they be not incorporated in the Act, they remained an absolute and fixed thing upon which the Act fastened the jurisdiction. And consequently the enactment made by the Governor-General in Council disallowing the High Courts from admitting appeals in cases where the Letters Patent expressly directed them to admit such appeals, is *ultra vires*, and not binding.

The question how far the Governor-General could derogate from the jurisdiction of the High Courts was argued in the case of *The Queen v. Meares* (1). Couch, C. J., in that case observes that he thought it unlikely that the mere mention in the Letters Patent of a certain jurisdiction should be intended to take away from the Governor-General's Council powers which it formerly possessed, and inferring that, as this would be the necessary result of holding that the Act did fasten the jurisdiction upon the subjects defined in the Letters Patent, he refused to give effect to what is transparently the plain meaning of the words; saying merely that the words in the Council's Act "provisions in the Act," which are not to be

affected do not apply to what was not in the High Courts' Act itself.

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The effect of this construction would be not only to subject the High Court to the Supreme Council, but also to the Local Councils; so that, whilst no jurisdiction was prescribed by the Letters Patent, it could only be affected by the Indian Council; the moment, however, it was conferred it became also subject to the powers of the Local Councils. It is impossible to attribute such an intention to the Legislature. If it was the intention to subject the jurisdiction of the High Court to the legislative powers of the Governor-General in Council, what meaning should be attached to s. 17 of the Act (24 & 25 Vict., c. 104), which contains an express provision for the purpose of altering the Letters Patent. [MARKBY, J., As I understand Couch, C. J., he holds that the Governor-General in Council is not prohibited from altering the provisions of the Letters Patent except so far as he is prohibited from doing so by the last clause of s. 9 of 24 & 25 Vict., c. 104.] That was my first view. And comparing s. 43 of 3 & 4 Will. IV., c. 85, with s. 22 of the present Indian Councils' Act, it will be found that there are important omissions or variations in the latter; for example, in s. 43 of the former Act, there occur the words "for all Courts of Justice, whether established by Her Majesty's Charter or otherwise, and the jurisdiction thereof," which are entirely omitted in 24 & 25 Vict., c. 67. The Chief Justice of Bengal had, under 16 & 17 Vict., c. 95, been added to the Legislative Council. His omission under 24 & 25 Vict., c. 67, must have had some connection with the omission of the words mentioned above. But whatever the reason may be, according to the principle by which statutes are construed, the omission of those words ought to furnish a strong argument in favour of the present contention. This was not before Couch, C.J., in *Queen v. Meares* (1). The Chief Justice in that case thought that "provisions of any Act passed in the present Sessions of Parliament or hereafter to be passed" refer to provisions of the Act itself. But the argument which he deduces from s. 42 of the Councils' Act militates against his own position, for the

(1) 14 B. L. R., 106.

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words used in s. 42 are similar to the words in s. 22. If "provisions of any Act" therefore are not to be taken as meaning provisions of the Letters Patent as part of the Charter Act, there is no reason why the Bombay and Madras Councils should not have the same power to restrict the jurisdiction of the High Courts as the Supreme Council. [MARKBY, J., referred to the Privy Council decision in the Bhaunagar case (1) as to the *ultra vires* of part of the Indian Evidence Act.] Cl. 44 of the Letters Patent is worthless, unless it forms a substantive part of the Act itself. [MARKBY, J.—Is it certain that that part of the Letters Patent which relates to the Privy Council is not from other authority than that conferred by the Charter Act, which does not contain any power of constituting Courts other than Courts in India?] If the Letters Patent were not made under the Act, then it must follow they were made without authority. [MARKBY, J.—The Queen had power to make them, had she not?] Yes, but the Governor-General in Council has not the power to bind the Privy Council. It is not one of the Courts mentioned in s. 22 of the Councils' Act. [MARKBY, J.—But there is no power in the Letters Patent to admit an appeal.] No, but that was one of the powers in existence from before. The Supreme Court had the power to allow or admit an appeal, and Couch, C. J., in the case of *Abul Kasim Koonjee v. Fatima Bibi*, reluctantly ordered security in an appeal to the Privy Council, thinking that s. 30 of the Supreme Court Charter was still in force.

The Indian Legislature's taking away the power of the High Court to admit an appeal to Her Majesty would not only amount to an interference with the Letters Patent, but would be a distinct contravention of a positive direction to do a certain act, that is, to admit the appeal. The Letters Patent were made by the Queen under the Act. No Legislature of limited powers can pass any statute so as to make the provisions of 24 & 25 Vict., c. 104, simply non-existing. Under s. 17 of the Charter, power is reserved to Her Majesty alone to revoke or modify Her Letters Patent as she might think fit. Can it be supposed that whilst vesting the Queen with the power of revocation the next day the Imperial Legislature should allow the Indian Legislature to

(1) L. R., 3 I. A., 162.

stultify the provisions of the Letters Patent. Where a power is given, the ability to perform it must also be given as incident to it: and the doctrine that an execution of a power is to be treated as a portion of the instrument creating the power, is universally applicable: Sugden on Powers, chap. ii, para 2. *In the Goods of Bibee Muttra* (1) Sir T. Franks laid down the principle that a Charter granted by an Act of Parliament is an Act of Parliament, and applying that principle to this case, it is contended that the Letters Patent form a component part of the Imperial Act. *The North British Railway Company v. Tod* (2) also illustrates incorporation of a document into an Act of Parliament, [MARKBY, J.—Supposing the provisions of the Letters Patent were incorporated with the Act, would not the decision in *Meares' case* remain untouched, in other words, did not s. 9 subject all existing powers to the powers of the Governor-General in Council?] Yes; but under the especial provisions of the Charter Act, and not otherwise. Besides, there is a distinction between this case and *Queen v. Meares*, inasmuch as the Charter Act did vary the powers of the High Court over European subjects. [MARKBY, J.—Was not the intention of the Legislature to confer on the Indian Legislature all existing powers, but not to give any power applicable to future circumstances, as is usually the intention in statutes giving powers?] I submit there was no such intention; for s. 17 of the Charter Act reserves expressly to the Queen a power of revocation, and supposing the Queen exercised her power in conflict with any Act of the Indian Legislature, would not she be able to override such Act? [MARKBY, J.—She would be trespassing on the powers of the Indian Legislature; so lately held by the Queen's Bench in a case of an order in Council.] The Charter Act gives her the power. It leaves to her an indeterminate residuum of power which she alone can exercise, and which enables her to modify her own directions. The words "save as by such Letters Patent may be otherwise directed," in s. 9, clearly show that the High Court was subjected to the powers of the Indian Legislature only to a limited extent, that is, so far as

(1) Morton's Cases (Mont. Ed.), 191, at p. 216. (2) 12 Cl. & Fin., 722, at p. 732.

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such subjection is not inconsistent with the express directions of the Letters Patent. The Chief Justice in *Queen v. Meares* (1) refers to 34 & 35 Vict., c. 34. This Act shows that it was necessary to confirm the statutes passed by the Indian Legislature by a special enactment of the Imperial Parliament. The argument therefore comes to this that the effect of those Acts of the Indian Legislature is to direct the High Court not to do a thing which the Letters Patent especially empowers—nay directs—the Courts to do; and therefore the taking away of such power from the High Court is *pro tanto* repealing the Letters Patent.

Mr. *Woodroffe contra.*—Cl. 39 of the Letters Patent, upon which so much stress has been laid, contains no special regulation regarding appeals to the Crown independently of previous Acts or rules. It simply declares what had been already declared before, that in cases where the value of the matter at issue was Rs. 10,000, or upwards, or where the High Court should certify the case to be a fit one for appeal,—“subject,”—and this is most important—“always to such rules and orders as are now in force.” Now s. 9 of 24 & 25 Vict., c. 104, does not contain any direction regarding appeals to the Privy Council. It has been contended that they fall under the words “administration of justice;” but when the previously existing rules on the subject are examined, it will be seen that these words have no relation to appeals to the Crown. There is an inherent right in the subject to carry his complaint to the Crown; but such right has been much curtailed and circumscribed by statutory directions. The first statute which interfered with this right was 25 Hen. VIII, c. 19 recited in 3 & 4 Will. IV., c. 41. S. 18 of 13 Geo. III., c. 63, by which the Supreme Court was established, directed that the Charter granted under that Act should provide the conditions for appeals to the King in Council. S. 30 of the Charter (2) made such provisions as were at the time deemed “proper and reasonable.” Coming

(1) 14 B. L. R., 106.

(2) Sm. & Ryan's Rules and Orders, p. 33.

to 3 & 4 Will. IV, c. 41, by which "the Judicial Committee" was constituted, we find s. 24 declaring that "it shall be lawful for His Majesty in Council from time to time to make any such rules and orders as may be thought fit for the regulating of the mode, form and time of appeal" from the Courts of Judicature in India; but otherwise making no change in the directions of s. 30 of the Supreme Court Charter. On the 10th of April 1838, an order in Council was signed, by which all the previously existing rules regarding valuation, &c., were rescinded, and the minimum limit of Rs. 10,000 among other things was definitely fixed in order to give an absolute right of appeal (1). These rules and orders were in force in the Supreme Court at the time of its abolition. The High Courts' Act contained no provision regarding appeals to the Privy Council. Cl. 39 of the Letters Patent, whilst reserving the prerogative of the Queen to admit appeals to herself, simply continued the old rules, that is what had been fixed by the order in Council referred to above. Those rules therefore were in no sense of the term 'part and parcel' of the Letters Patent so as to take them out of the legislative power of the Governor-General in Council. The argument therefore founded on Sir J. Frank's dictum in *The Goods of Bibee Muttra* (2) falls to the ground, even on the assumption that the Letters Patent form a part of the Charter Act. But is Sir J. Frank right in his view that a Charter granted under an Act is a part of the statute? Russell, C. J., expressly declined to coincide with Sir J. Frank's view. In order to determine whether the Letters Patent form a part of the High Courts' Act, it must first be considered whether the Queen by her Charter could enlarge or diminish the provisions of the statute. It can hardly be contended that she could do this. But as long as the decision in *Queen v. Meares* (3) stands, there is no need of discussing whether the Letters Patent form a part of the Act. Couch, C. J., expressly decided that "the provisions of any Act" referred to the Act itself, and not to any

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(1) Sm. & Ryan's Rules and Orders, App. ciii.

(2) Morton's Cases (Mont. Ed.), 191, at p. 216.

(3) 14 B. L. R., 106.

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thing which arose out of the Act, and the other Judges (Phear and Morris, JJ.) concurred in his view. Besides, the wording of s. 11 of 24 & 25 Vict., c. 104, shows clearly that the Legislature did not intend the Letters Patent to form part of that Act. That the Indian Legislature has the power to modify and alter the jurisdiction of the High Court vested in them by the Letters Patent, was decided in *Madhub Chunder Poramanick v. Rajcoomar Dass* (1). Couch, C. J., in that case held that the words "until otherwise provided" in cl. 18 of the Letters Patent of 1862, taken in connection with the 44th clause of the Charter of 1865, where it is expressly declared that the provisions in it are subject to the legislative powers of the Governor-General in Council, show that the Government here in its legislative capacity has the power to make the alterations (2).

Mr. *Evans* on the same side.—Cl. 39 of the Letters Patent simply authorises Her Majesty's subjects to appeal to the Crown, but does not lay down any rules to regulate the procedure except the words, "subject to such rules as are in force." The High Courts' Act had left the rules which existed at the time perfectly intact, subject to the legislative powers of the Governor-General in Council as well as of Her Majesty in Council. The rules existed not by virtue of the High Courts' Act but prior to, and independently of, the same, and therefore the abolition of the Supreme Court and the substitution in its place of the High Court effected no change in them. That the old rules continued in force is clear from what was said by Peacock, C. J., in *Gobardhan Barmono v. Srimati Mani Bibi* (3). Therefore it is clear that the rules regulating the admission of an appeal to the Privy Council do not in any sense form part of the Charter by which the High Court was constituted. Those rules were merely for the purpose of conveniently judging which cases should go to the Privy Council. Act VI of 1874 does not take away the common law right of appeal to the Crown. It simply provides a mode of getting a

(1) 14 B. L. R., 76.

(2) *Id.*, pp. 83-84.

(3) 5 B. L. R., 76.

credential by the litigant regarding the subject-matter of the suit. It is submitted, therefore, that the Act in question is not *ultra vires*, and that the admission of appeals to the Privy Council by the High Courts must be regulated by the procedure provided in it. If the petitioner is aggrieved he can apply to the Judicial Committee for special leave to appeal, for this Act in no way curtails or could curtail the prerogative of the Queen to allow an appeal where the ends of justice make it necessary; *Queen v. Joyhissen Mookerjee* (1).

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Mr. *Kennedy* in reply.—S. 11 of 24 & 25 Vict., c. 104, bears strongly in favour of my construction. The wording of s. 9 is completely different from that of s. 11, which refers simply to the procedure, whilst the former section refers to the jurisdiction of the Court and not to the *lex fori*.

MARKBY, J. (after stating the nature of the application, continued:—) This, it will be observed, is not an application in the form required by Act VI of 1874, and it has been stated that the petition was so drawn expressly in order to raise the question whether the provisions of that Act were binding.

I may say at once that no case for granting special leave to appeal has been made out.

An attempt was also made to obtain, upon this petition, a certificate under Act VI of 1874, that a substantial question of law was involved in the case; and I was asked to grant this certificate, should I think that Act to be binding. But it was subsequently admitted that upon this petition, this alternative course could not be pursued.

The question therefore which remains is, whether the petitioners in spite of Act VI of 1874 have a right of appeal, simply upon the ground that the property is above the value of Rs. 10,000. There is no doubt that the petitioners would have had that right prior to the passing of Act VI of 1874, and the petitioners contend that the Governor-General in Council had no power to deprive them of that right by legislation. Questions of this kind are of great importance, and if there

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is any doubt, as there must sometimes be, about the validity of an Act of a Legislature, the powers of which are not supreme, it is extremely desirable that the doubt should be at once fully discovered. If the doubt is unfounded, the sooner it is removed the better. I do not, therefore, regret that this question has been raised, and especially as I have had the advantage of a very able argument to assist me in coming to a conclusion.

The line of argument taken on behalf of the petitioner in order to establish that I am bound to admit this appeal is as follows:—The 39th clause of the Letters Patent of 1865 (it is said) gives an appeal to the Privy Council provided the sum or matter at issue is of the amount or value of not less than Rs. 10,000. These Letters Patent were issued by Her Majesty under the provisions of the 24 & 25 Vict., c. 104. By s. 9 of that Act, each of the High Courts established under that Act is bound to exercise “all such powers and authority for and in relation to the administration of justice as Her Majesty may by such Letters Patent grant and direct.” The admission of an appeal to the Privy Council is a power in relation to the administration of justice, and as the Letters Patent give an appeal as of right, when the value is Rs. 10,000, the admission of this appeal is a power which this Court is commanded by the Act to exercise. And although by Act VI of 1874 the Governor-General of India has directed otherwise, this cannot nullify the directions contained in the Imperial Act, because the Governor-General in Council is expressly prohibited by s. 22 of 24 & 25 Vict., c. 67, from making any law or regulation which shall repeal or in any way affect the provisions of that Act or of any Act passed in that Session of Parliament. Both Acts were passed in the same Session of Parliament, and therefore both Acts, as well as the Letters Patent, are to be read, for this purpose, as if Act VI of 1874 had never passed. This is the argument for the petitioners.

To this argument the following objections are taken by Mr. Woodroffe and Mr. Evans who appeared on behalf of the defendants in the suit to oppose the granting of this petition.

- 1.—That the provisions contained in the Letters Patent are

not any of them provisions of the 24 & 25 Vict., c. 104, and are therefore not at all within the restriction contained in s. 22 of 24 & 25 Vict., c. 67. 2.—That by the express words of s. 9 of 24 & 25 Vict., c. 104, any power or authority thereby reserved to the High Courts is made subject to the legislative powers of the Governor-General in Council. 3.—That the Letters Patent confer no power on this Court to admit an appeal to the Privy Council. 4.—That the 24 & 25 Vict., c. 104, confers on Her Majesty no power to give an appeal to herself in her Privy Council, and that in so far as she has done so by the Letters Patent, it must be in virtue of her prerogative or of some previous Act of Parliament, and that for this reason also, the restriction contained in s. 22 of 24 & 25 Vict., c. 67, does not apply.

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It is most convenient to deal with the two last objections first, and I will consider them together. I think it desirable to call to mind what the position of a Judge of this Court is, when sitting here to admit an appeal to the Privy Council. I am speaking of appeals from the decisions of this Court on its appellate side. The position of a Judge admitting an appeal from the decision of this Court in its original jurisdiction may be the same, but the history of the matter is different, and I do not wish to embarrass the case by unnecessary considerations. A Judge sitting here to admit appeals from the decisions of this Court on the appellate side has in the majority of cases no independent authority whatsoever. The case has been finally heard and determined by a Division Bench of this Court, which in theory of law is a decision of the High Court. All that a Judge of this Court can in most cases do after that, is to assist the parties in bringing their appeal before the Privy Council. Of course, an Act of the Imperial Parliament, or a provision of the Letters Patent, issued in pursuance of an Act of Parliament or an order issued by Her Majesty in Council, might confer upon this Court, or a Judge of this Court, not only power to admit or reject an appeal, but might make the right to appeal dependent upon that admission or rejection. But if that has been done in any case whatever, it is certainly only in some one or more of the cases in which this Court has power to declare that the

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case is a fit one for appeal: and this class of cases is now out of consideration. Moreover, whether the Governor-General in Council has or has not the power to restrict by legislation the right of appeal to the Privy Council, he has never yet thought fit to do so. In all legislation upon the subject, including Act VI of 1874, full and unqualified exercise of the sovereign's pleasure in the admission or rejection of appeals has been preserved. The question before me therefore does not touch the right of appeal at all; it only touches the proceedings of this Court in forwarding the appeal.

The appeal to the Privy Council from the Court of Sudder Dewanny Adawlut (which this Court on its appellate side represents) was granted by the 21 Geo. III, c. 70. Probably it exists independently of that statute—*Salih Ram v. Azim Ali Beg* (1). But as Mr. Ritchie clearly points out in an opinion quoted at length in the report to which I have just referred, the Courts here have no power to *admit* or *allow* an appeal unless expressly authorized to do so by competent authority. I am very glad to find an opinion I had myself formed supported by that of so able and experienced a lawyer. The power to admit an appeal was (as far as I am aware) first conferred upon the Sudder Dewanny Adawlut by Reg. XVI of 1797, s. 2; certain restrictions were placed upon the exercise of that power by the orders of Her Majesty in Council of 10th April 1838, passed in pursuance of 3 & 4 Will. IV, c. 41; and the practice of the Court in the admission of appeals has also been regulated by certain rules of the Court itself, made by the Sudder Dewanny Adawlut on the 17th December 1858, and by this Court on the 30th of July 1870. But there is nothing whatever in 24 & 25 Vict., c. 67, which would prevent the Governor-General in Council altering or repealing any of those provisions.

It is argued that the words "subject always to such rules and orders as are now in force" in cl. 39 of the Letters Patent, incorporates those provisions into the Letters Patent, and so removes them from the sphere of legislation by the Governor-General in Council. I shall hereafter state other reasons why I do not think this to be the case. Apart from other considerations

(1) 8 Moore's L. A., 274.

I think the contention is well founded that cl. 39 of the Letters Patent was not inserted in pursuance of the 24 & 25 Vict., c. 104. The Queen was only empowered by this Act to establish by Letters Patent a High Court of Judicature at Fort William in Bengal, and similar Courts elsewhere in India. The power contained in 13 Geo. III, c. 63, to give by the Letters Patent a right of appeal to the Privy Council, is not repeated in 24 & 25 Vict., c. 104, and I do not see in the later Act any words from which such a power could be inferred. I do not say that these provisions in the Letters Patent are therefore invalid, all I say is that they do not rest for their authority upon 24 & 25 Vict., c. 104. This is further shewn by the unlimited power reserved to Her Majesty by cl. 39 to alter the provisions of that clause at any future time, which would be contrary to s. 17 of the 24 & 25 Vict., c. 104, if she were acting in pursuance of that statute. I consider, therefore, that even if all the other propositions upon which the argument for the petitioners is founded are correct, still it is not established that the admission of an appeal to the Privy Council is one of those powers which this Court is by the first part of s. 9 of 24 & 25 Vict., c. 104, commanded to exercise. I think its existence is entirely independent both of that Act and of the Letters Patent.

I think it right, however, not to leave the rest of the argument unnoticed, which bears upon the general construction of the 24 & 25 Vict., c. 104, and the 24 & 25 Vict., c. 67. I agree with a good deal that Mr. Kennedy has said upon this subject, though I do not put exactly the construction upon these two Acts which he contends for. I understand him to argue that no powers which the Letters Patent profess to confer upon this Court can be touched by the Governor-General of India in Council whether they be new or old. Mr. Kennedy admits that this is contrary to the ruling in *Queen v. Meares*(1), which he considers to lay down that the Governor-General of India in Council has unlimited legislative authority in regard to all the provisions of the Letters Patent. This has I believe been generally considered to be the result of the reasoning in the decision of *Queen v. Meares* (1), and had I been able to accept that reasoning in

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its entirety, there would have been no necessity for me to do anything more than to express my assent to it and upon the authority of this case to overrule any contrary contention. But though I fully concur in that decision I have considerable difficulty in accepting the reasoning by which it is supported if it really goes to that extent. And as I am compelled to refer to *Queen v. Meares* (1), it is, I think better that I should state frankly wherein that difficulty consists.

In order to do this it is necessary that I should state my own view of the 24 & 25 Vict., c. 104. It seems to me to have been the intention of the framers of that Act to make it clear by the Act itself what were the future powers of the Indian Legislature in relation to the High Courts. There are three sections in which reference is made to legislation in India, the 9th (in the second clause) the 11th and the 13th. The two first preserve to the Governor-General of India in Council and to him alone the same legislative powers as he had before. The last confers a new power on the High Court and confers a new power on the Governor-General in Council and on him alone to legislate in respect of it. It would therefore seem that Parliament had signified in what respects the High Court should be subject to legislative authority in India, and what that legislative authority should be. And it is not unimportant to observe that this (with the insignificant exception contained in s. 13) is precisely the legislative authority which existed before the Act was passed.

But if we accept the reasoning in the decision of *Queen v. Meares* (1) to the extent to which it has been pressed, we shall find that the legislative authority over the High Courts in India is wholly different from that indicated by 24 & 25 Vict., c. 104, and from what it was before, and that it has been changed, not directly, as we should expect if any change were intended, but indirectly. It is said in *Queen v. Meares* (1) that the meaning of the words "any provisions of any Act passed in the present Session of Parliament or hereafter to be passed" in s. 22 of 24 & 25 Vict., c. 67, is "provisions in the Act (*i. e.*, 24 & 25 Vict., c. 104) itself, and does not include provisions in

(1) 14 B. L. R., 106.

the Letters Patent. If that means that under the words of s. 22 itself all the provisions in the Letters Patent can be altered by the Governor-General in Council, and that for this purpose it is not necessary to resort to chapter 104 at all, then it would seem, that not only the Governor-General in Council, but the Governors of the other Presidencies in Council and the Lieutenant-Governor of Bengal in Council, may legislate for the High Courts. For if s. 22 contains no restriction in this respect, neither does s. 42. Surely if that had been intended, ss. 9 and 11 would not have contained provisions which in that case would have been not only unnecessary, but positively misleading. If that had been the intention, either 24 and 25 Vict., c. 104, would have been wholly silent about legislation in India, leaving that matter as it stood under c. 67; or else wherever the Council of the Governor-General was mentioned the other Councils would have been mentioned also; and the words "subject and without prejudice to &c." in the second part of s. 9 would have been made to govern the whole clause.

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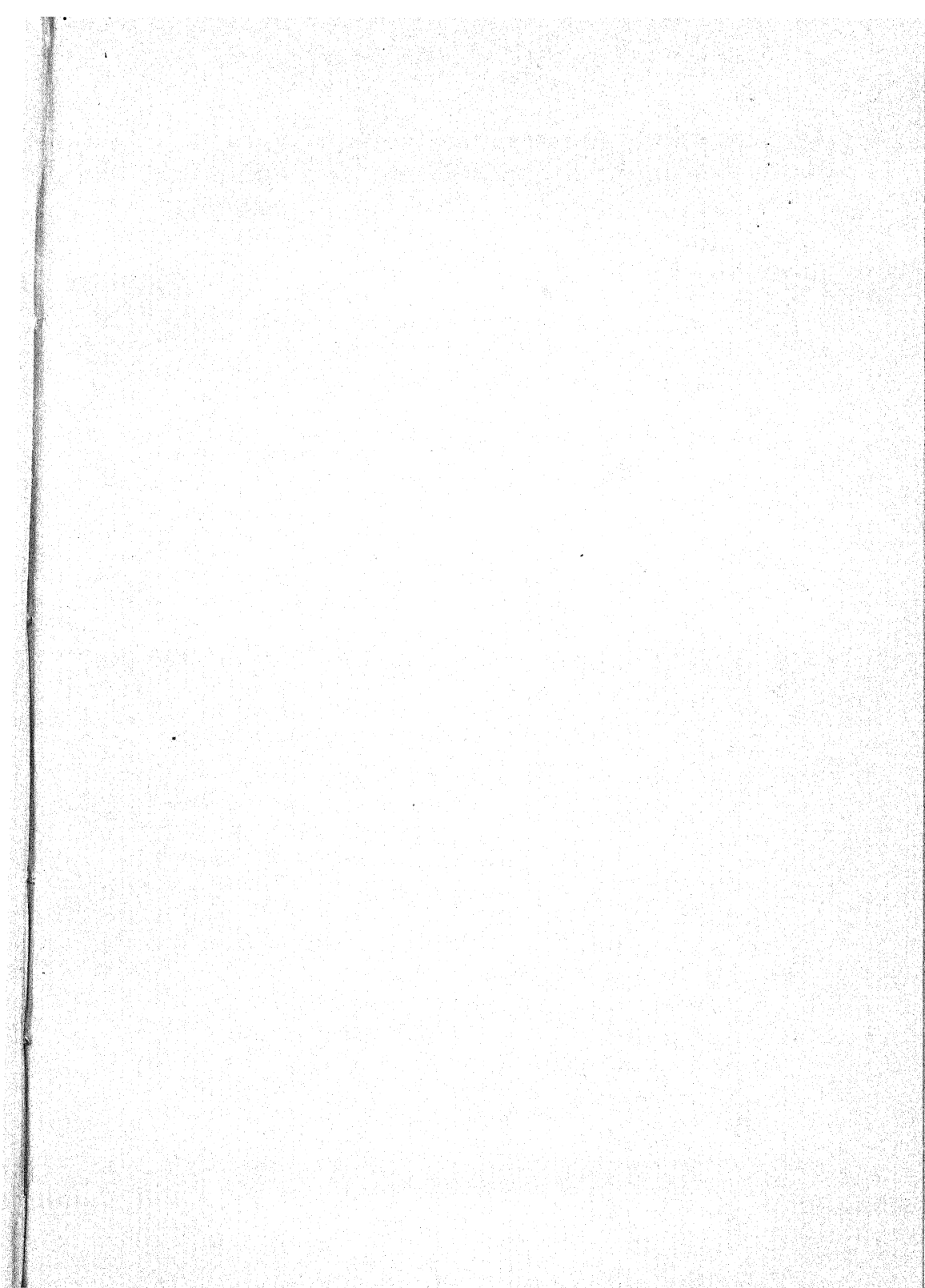
I admit the force of the observation in *Queen v. Meares* (1) that it could not have been intended that the powers of the Court if inserted in the Letters Patent should be beyond the reach of the Governor-General in Council, whilst the same powers, if not inserted in the Letters Patent, should be subject to his legislative control. But it seems to me that it is not necessary in order to avoid this result to hold that s. 22 of 24 & 25 Vict., c. 67, does not contain any prohibition against interfering with the provisions of the Letters Patent. That section must be read with ss. 9 and 11 of the 24 & 25 Vict., c. 104. By the express words of s. 9 of 24 & 25 Vict., c. 104, "save as by such Letters Patent may be otherwise directed" the former powers are reserved to this Court by the Act, provided the Letters Patent do not interfere with them, and as to all these powers the Governor-General in Council is expressly empowered to legislate. I think we hold these former powers under the Act, and not under the Letters Patent, and that the Act itself has rendered them subject to the legislative control

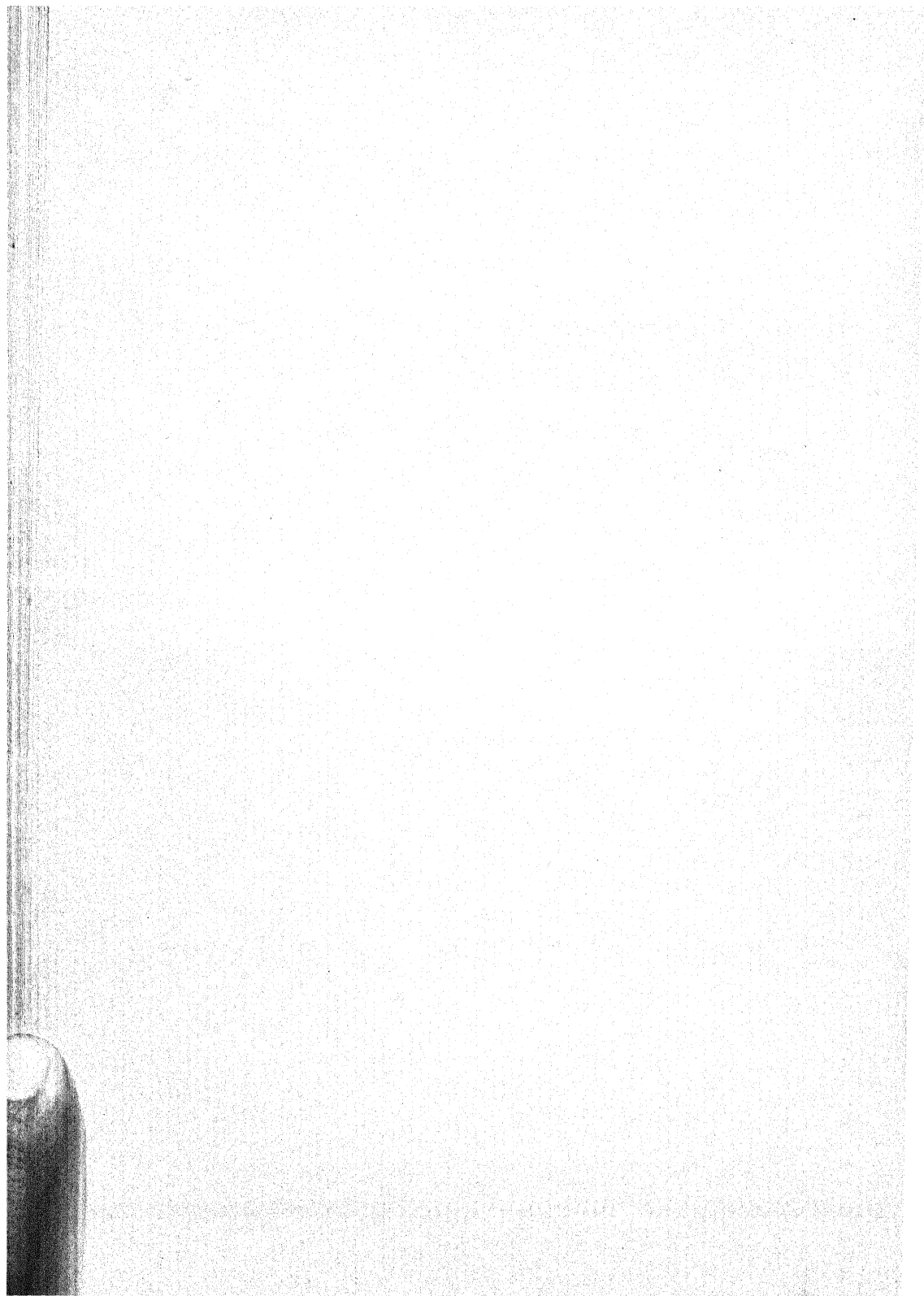
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of the Governor-General in Council. If (as was possible) Her Majesty had not chosen to confer any new power or authority on the High Court, they would then have remained in all respects subject as before to the legislative control of the Governor-General in Council. On the other hand, if she chose (as indeed was actually done) to leave all the old authority substantially as it was with some slight changes, in that case the control of the Governor-General in Council is to some extent curtailed. The line appears to me to be drawn exactly as a Supreme Legislature might be expected to draw it. Whatever is left untouched by the Letters Patent to be thereafter issued, the Indian Legislature may deal with as before; but whatever Her Majesty may chose to alter or create, that the Legislature must not interfere with. This was necessary even though the changes to be introduced by Her Majesty might turn out to be few and trivial, because otherwise Parliament would have been delegating at the same moment to two separate persons, Her Majesty in Council and the Governor-General in Council, co-ordinate authority to deal with the very same subject-matter, a condition of things clearly to be avoided. When the old powers of the abolished Courts were merely repeated in the Letters Patent, it was, of course, understood by Her Majesty that these were subject to be altered by the Governor-General in Council, and very likely it is because this is done to so very large an extent, that the legislative powers of the Governor-General in Council are in the 44th clause of the Letters Patent expressly recognized.

I repeat that this view does not touch the decision of *Queen v. Meares* (1); it only affects the reasoning by which it is supported. In the view that I take of the matter, the provision of the Letters Patent there in question being one which left the jurisdiction of this Court exactly where it was before, it was by the second clause of s. 9 expressly made subject to the legislative control of the Governor-General of India in Council.

On the other hand, it seems to me scarcely likely that if Parliament had intended that the Provincial Councils should





have full power to legislate for the High Courts, it would have excluded those Councils from the control of these Courts in so insignificant a matter as the exercise of the powers of the Court by single Judges or Division Benches, which is an express provision of the Act itself (s. 13), and therefore can only be touched by the Governor-General in Council, who is alone mentioned in that section.

A strong argument against any construction of the Acts of Parliament of 1861 which would place the High Courts under the control of the Provincial Legislatures appears to me to be afforded by the Act passed ten years afterwards (34 & 35 Vict., c. 34). That Act recites that it is expedient that the power of making laws and regulations conferred on Governors of Presidencies in India in Council should in certain respects be *extended*, and then proceeds to enact that the Provincial Legislatures may confer jurisdiction over European British subjects upon Magistrates in certain cases. This, as is pointed out, in *Queen v. Meares* (1), is inconsistent with the Governor-General in Council not having the like power. It is equally inconsistent with the Provincial Legislature having previously had such general authority as, it has been said, results from the construction of the Acts adopted by the reasoning in *Queen v. Meares* (1).

But though I cannot go the length of holding that the powers of the High Court in India are subject to the legislative control of all the Provincial Councils, or of the Governor-General in Council in all respects, I am still of opinion, that they are to a considerable extent subject to the legislative control of the Governor-General in Council, not under c. 67, s. 22, but under c. 104, ss. 9 and 11. Mr. Kennedy's argument, therefore, in my opinion, fails on the second objection taken to it by the defendants, though not on the first. Even if the power to admit as appeal were conferred by the Letters Patent, it is not a new power, and it has therefore in my opinion been made by Parliament expressly subject to the legislative control of the Governor-General in Council, but not of any other legislative authority in India.

It was argued against this view of the legislative authority

(1) 14 B. L. R., 106.

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of the Governor-General in Council, that it is indicated by a comparison of the phraseology of s. 22 of the 24 & 25 Vict., c. 67, with the phraseology of the 3 & 4 Will. IV, c. 85 s. 43 that the High Courts were not to be subject to any legislative authority in India. The difference in the two sections is, that whilst the former Act expressly declares all Courts to be so subject, in the latter Act these words are omitted. I do not think that it is a sound method of construing Acts of Parliament to control the effects of general powers which are conferred, because special powers are *not* conferred. To confer any special powers was in this case wholly unnecessary, and the Legislature may well have thought when passing the second Act that it was a mere waste of words to do so. Nor indeed does this argument, even if sound, affect my view of the matter, for the power of the Governor-General in Council to legislate for the High Courts rests in my opinion not on the 24 & 25 Vict., c. 67, but on the 24 & 25 Vict., c. 104.

For all these reasons it seems to me that this application must be rejected with costs.

Application refused.

• APPELLATE CRIMINAL.

Before Mr. Justice Macpherson and Mr. Justice Morris.

1876
August 23.

THE QUEEN *v.* BAIJOO LALL AND OTHERS.

IN THE MATTER OF THE PETITION OF BAIJOO LALL AND ANOTHER.*

Criminal Procedure Code (Act X of 1872), s. 471—Act XXIII of 1861, s. 16—Order sending Case to Magistrate for enquiring into Offence of giving false Evidence—Preliminary Enquiry—Vagueness of Charge.

Although s. 16 of Act XXIII of 1861 gives Civil Courts powers similar to those conferred on Civil and Criminal Courts alike by s. 471 of the Criminal Procedure Code, the whole law as to the procedure in cases within those sections is now embodied in s. 471 of the Criminal Procedure Code.

In a suit brought to recover possession of certain property, the Judge decided one of the issues raised in the plaintiff's favour, but on the important

* Criminal Motion, No. 189 of 1876, against the order of the Judge of Zilla Gya, dated the 22nd June 1876.

issue as to whether the plaintiff ever had possession, he found for the defendant. The plaintiff was not examined, but on the issue as to possession he called two witnesses. The Judge disbelieved their statements, and considering that the plaintiff had failed to prove his case, he gave judgment for the defendant, without requiring him to give evidence on that issue. In the concluding paragraph of his judgment, the Judge directed the depositions of the two witnesses above referred to, together with the English memoranda of their evidence, to be sent to the Magistrate with a view to his enquiring whether or not they had voluntarily given false evidence in a judicial proceeding, and he further directed the Magistrate to enquire whether or not the plaintiff had abetted the offence of giving false evidence, on the ground that as the witnesses were the plaintiff's servants he must personally have influenced them, and also to enquire whether the plaint which the plaintiff had attested contained averments which he knew to be false. On a motion to quash this order, *held*, that under s. 471 of the Criminal Procedure Code, the Judge has no power to send a case to a Magistrate except when, after having made such preliminary enquiry as may be necessary, he is of opinion that there is sufficient ground (*i.e.*, ground of a nature higher than mere surmise or suspicion) for directing judicial enquiry into the matter of a specific charge, and that the Judge is bound to indicate the particular statements or averments in respect of which he considers that there is ground for a charge into which the Magistrate ought to enquire, and that the order was bad, because the Judge had made no preliminary enquiry and because it was too vague and general in its character.

THIS was an application to quash an order of the Judge of Gya sending the plaintiff in a Civil suit and two of his witnesses to a Magistrate for enquiry into charges of giving false evidence and of abetment of that offence. In that suit the present petitioner Baijoo Lall sought to recover possession of certain property from which he alleged the defendant in the suit had illegally evicted him. He claimed as sub-lessee of one Rajun Kunwar who, he stated, was lessee of the property under Ranees Sunut Kunwar the owner thereof. Amongst other issues raised in the case was an issue as to whether Ranees Sunut Kunwar had executed any lease to Rajun Kunwar: another issue was whether the plaintiff had ever been in possession. Evidence was gone into at the trial, and the Judge decided the former issue in favor of the plaintiff, but on the important issue as to possession he found for the defendant; and for that reason he dismissed the suit. Upon the issue as to possession no witnesses were called for the defendant, and the only witnesses called for the

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plaintiff were two persons, Juggernath Singh and Nowrangi Lall, the former of whom joined in the present application. The Judge disbelieved the statements of these two witnesses, and, considering that the plaintiff had failed to prove his case, gave judgment for the defendant without calling upon him to go into evidence on that issue.

In the concluding paragraph of his judgment the Judge ordered as follows:—

“The depositions of Juggernath Singh and Nowrangi Lall, together with the English memoranda of their evidence, will be sent to the Magistrate with a view to his enquiring whether or not they have voluntarily given false evidence in a judicial proceeding; and as the witnesses are the servants of the plaintiff in this suit, Baijoo Lall, he must presumably have influenced them. I further direct that an enquiry be made by the Magistrate whether or not the said Baijoo Lall has abetted the offence of giving false evidence in a judicial proceeding; and also whether the plaint, which he has attested, contains an averment which he knew to be false. In the course of that enquiry it may be well that the Magistrate should examine those witnesses who were cited by the defendants to rebut the plaintiff's allegation of possession, but whom I considered it unnecessary to examine as the plaintiff's witnesses so completely broke down.”

The petitioners Baijoo Lall and Juggernath Singh now moved the High Court to quash this order on the following grounds:— That there was no evidence to show that the statements of Juggernath Singh were false or that Baijoo Lall had abetted the offence of giving false evidence, and the mere circumstance that his witnesses had deposed in his favor did not warrant the inference that he had abetted such an offence; that the enquiry as to whether the plaint contained an averment which the plaintiff knew to be false was too general and vague, especially where important issues had been decided in the plaintiff's favor; that the Judge had failed to comply with the requirements of s. 471 of the Code of Criminal Procedure, and had made no preliminary enquiry, nor recorded any proceeding showing that he was of opinion that there was sufficient ground

for enquiring into the charge; that the order should have specified the particular acts or statements which constituted the offence charged; that his reasons for disbelieving the evidence were highly conjectural, and that it was beyond the scope and object of the law that such prosecutions should be allowed upon such reasons, and that the order was made without jurisdiction.

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Upon this motion the High Court sent for the record and called upon the Judge to show cause why his order should not be set aside.

In this return to the High Court the Judge stated that he had made the order in exercise of the powers vested in the Court by s. 16 of Act XXIII of 1861; that he made no preliminary enquiry, as the statement of the witnesses and their demeanour satisfied him that they had given false evidence, and he submitted that "the necessity or the reverse which existed for a Magisterial enquiry was all that the preliminary enquiry of the Civil Court could decide;" and that "the framing of a technical charge was the duty of the Magistrate, and not of the Court directing the Magistrate to hold an enquiry; the duty of the Court was limited to a reasonable indication of the nature of the offence to be enquired into."

Mr. *C. Gregory* for the Crown showed cause.

Mr. *Branson* and Mr. *Sandel* in support of the rule.

The judgment of the Court was delivered by

MACPHERSON, J.—This is an application to quash an order of the Judge of Gya, under s. 471 of the Criminal Procedure Code sending the plaintiff in a Civil suit and two of his witnesses to a Magistrate for enquiry into charges of giving false evidence, &c.

I say the order was made under s. 471 of the Criminal Procedure Code, because although s. 16 of Act XXIII of 1861 gives Civil Courts powers similar to those conferred on Civil and Criminal Courts alike by s. 471, there can be no doubt that the whole law is now embodied in s. 471, and our

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jurisdiction to interfere in the matter is not affected by a suggestion that the order in question was, or might have been, made under s. 16 of Act XXIII of 1861 and not under s. 471.

(The learned Judge stated the facts of the case and continued:)

It is contended for Baijoo Lall and Juggernath that the Judge had no power to make that order, inasmuch as he never made any preliminary enquiry and had no sufficient ground on which to base such an order as required by s. 471.

We think the objection is valid, and that the Judge had no jurisdiction to deal with these persons as he did. As regards Juggernath, although the Judge disbelieved his evidence, no witness had been called to contradict him. And as regards Baijoo Lall he was not examined before the Judge at all, and there is absolutely nothing to show that he abetted the offence of giving false evidence excepting the one naked fact that he was the plaintiff in the cause. The Judge says he must presumably have influenced his own witnesses. There is no such legal presumption, and we may add that if there were, it would put an end to litigation in the Civil Courts, for no plaintiff would be safe. The Judge, because he disbelieved the two witnesses called for the plaintiff, considered no "preliminary enquiry" necessary. But that is in contravention of the law: for the law permits the Judge to send the case on to the Magistrate only if, after having made such a preliminary enquiry as may be necessary, he is of opinion that there is sufficient ground (*i. e.*, ground of a nature higher than mere surmise or suspicion) for directing judicial enquiry into the matter of a specific charge.

That the Judge did not make any preliminary enquiry and did not know what specific charges he wanted the Magistrate to enquire into is clear. The Magistrate is directed to enquire generally whether or not the two witnesses have voluntarily given false evidence in a judicial proceeding, and as regards Baijoo Lall, "whether the plaint which he has attested contains an averment which he knew to be false." S. 471 does not warrant the Judge in issuing a general roving commission such as this to a Magistrate to inquire

generally into the truth or falsehood of depositions or of averments in a plaint, and the Judge was bound to indicate the particular statements or averments in respect of which he considered that there was ground for a charge into which the Magistrate ought to enquire. The Judge says, "The duty of this Court was limited to a reasonable indication of the nature of the offence to be enquired into" and again, "the necessity or the reverse which existed for a Magisterial enquiry was, I submit, all that the preliminary enquiry of the Civil Court could decide." We think that this view of the law is incorrect. Something more than a mere indication that a witness has spoken falsely is needed before a Civil Court is justified in initiating a prosecution for giving false evidence. There must be, it seems to us, evidence of a direct and substantive nature before the Court, evidence going to show that the statement made by the witness is absolutely false. There must be in the words of the law "sufficient ground" for enquiring into the matter of a specific charge.

Altogether, we think that the Judge's order is bad, he having made no preliminary enquiry as was clearly necessary, and the order being too vague and general in its character. In thus deciding, we follow the course taken in the case of *Kali Prosunno Bagchee* (1).

The power given by s. 471 should be used with care and after due consideration. And it is by no means in every instance in which a party fails to prove his case, that the Judge who has decided against such party is justified in exercising the powers given him by this section. So long as it is a case as to which there is any possible doubt, or in which it is not perfectly certain that the Judge's decision must be upheld in the event of there being an appeal in the Civil suit, the Judge acts indiscreetly and wrongly if the moment he has given his judgment in the Civil suit he exercises the power given him by this section. At the same time, if in the course of the civil trial the Judge has before him clear and unmistakable proof of a criminal offence, and if, after the trial is over, he on consideration thinks it necessary to proceed at once, of course it may be right to do so.

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Judges should however bear in mind that criminal prosecutions are frequently suggested by successful litigants merely to prevent an appeal in the Civil suit; and they should be careful not to lend themselves to such suggestions too readily. They should also recollect that when they proceed under s. 471, the responsibility for the prosecution rests upon the Judge entirely; such a prosecution being a very different thing from a prosecution instituted on the complaint of a private party and merely sanctioned by the Court under s. 468.

Order quashed.

APPELLATE CIVIL.

Before Mr. Justice Markby and Mr. Justice McDonell.

1876
 July 3.

RAM NEEDHEE KOONDOO (PLAINTIFF) v. RAJAH RUGHOO NATH
 NARAIN MULLO AND ANOTHER (DEFENDANTS).*

*Declaratory Decree—Consequential Relief—Act VIII of 1859, s. 15—
 Jurisdiction of Civil Courts.*

A granted a lease of his entire property to the plaintiff for a term of years, with power to enhance the rents and make settlements. Immediately after A executed a pottah in favor of B, covering a portion of the same estate, whereby B's rent was to remain unchanged for a period conterminous with the plaintiff's lease. In a suit by the plaintiff against B and A's representative to have the pottah set aside, it was objected that, inasmuch as the deed had not been as yet set up against the plaintiff, nor any injury shown to have been occasioned to him thereby, he had no cause of action; *held* that the suit was maintainable.

In laying down the rule that a "a declaratory decree cannot be made, unless there be a right to consequential relief," the Privy Council did not intend to deny to the Courts of this country the power to grant decrees in any case in which, independently of the provisions of Act VIII of 1859, s. 15, they had the power to grant a decree. This power is generally the same as that of the Court of Chancery in England.*

Suit to set aside a pottah, dated the 1st Srabun 1280 (15th July 1873), executed by the late Rajah Bikramajit Mulla, zemindar, in favor of Suroop Mahto, the first defendant.

* Special Appeal, No. 385 of 1876, against a decree of the Judge of Zilla Midnapore, dated the 26th of February 1876, reversing a decree of the Officiating Munsif of that district, dated the 3rd of September 1875.

The plaintiff was a creditor of the late Rajah, who, in order to pay off his debts from the income of the estate, gave a lease of his entire property to the plaintiff for a term of fourteen years, commencing with the year 1280 (1873). The lease was dated the 22nd February 1872, and the jama fixed in it was Rs. 35,000. This document, among other conditions, contained stipulations to the following effect:—that the Rajah should have the jama fixed in the lease tested by *mukabulla*, or reference to ryots, within six months from the date thereof; that the lessee should possess the power of enhancing the rents, and the enhanced amount should be appropriated by him as his profit; and that, during the term of the lease he should have authority as complete as the Rajah himself, to make settlements in the *zemin-dari*, the only qualification being that such settlements should not be injurious to the reversionary interest of the *zemindar*.

Subsequently on the 1st Srabun 1280 (15th July, 1873), that is, after the lease had been several months in force, the Rajah granted to the first defendant, Suroop Mahto, the pottah which was sought to be set aside in this suit. The pottah in question recited that the subject-matter of the grant was formerly in the possession of the defendant under what was called a *mondullee* (1) settlement; and that, owing to the condition for adjustment of jama contained in the plaintiff's lease, a fresh *mondullee* jote settlement was granted to the defendant on an enhanced *malguzari*, which should not be liable to further enhancement during the entire term of the pottah extending from 1280 to 1294 (1873—1887). The Rajah subsequently granted pottahs of a similar character to other parties covering the entire estate.

The plaintiff instituted the present suit against the second defendant (called the minor defendant in the judgment of the High Court) the grandson and representative of the late Rajah, and Suroop Mahto, to have the pottah set aside, alleging that it was executed collusively in detriment of his interests, and that the Rajah had no power to make any settlement during the

(1) The position of a *mondul* on and paid the landlord the rate fixed by this estate was stated to be that he the pottah, taking all the risk of collected the rents from the ryots, tion upon himself.

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continuance of the lease by which the malguzari of the first defendant was made invariable, and not liable to enhancement by the plaintiff during the entire period of the ijara.

The first defendant pleaded, *inter alia*, that the plaint disclosed no cause of action; that inasmuch as there was no express allegation in it regarding the nature and extent of the loss incurred by the plaintiff, the suit was not maintainable; and that the pottah was granted in pursuance of the condition for adjustment in the lease.

On behalf of the minor defendant, Mr. Harrison, the Collector, representing the Court of Wards, submitted the matter to the Court, saying in his written statement, that, "if the pottahs granted to the ryot and jote monduls be held by the Court as contrary to the conditions of the lease and be on that account set aside, I have no objection thereto."

The Munsif found that the pottah was executed after the period within which the jama stated in the lease should have been tested by reference to ryots; that the grant of the pottah was no adjustment as understood by the parties; that the Rajah, finding that the mofussil collections were less than the jama fixed in the lease, entered into a collusive arrangement with his principal ryots, whereby, in consideration of their rents remaining unchanged for fifteen years, they undertook to take pottahs from him at a nominally higher rent; and that the pottah in question, if held valid, would nullify the terms of the lease. The Munsif accordingly decreed the plaintiff's suit.

The minor defendant appealed to the District Judge, making the first defendant, who did not appeal, a respondent. The lower Appellate Court set aside the Munsif's decree and dismissed the plaintiff's suit, holding that the pottahs were granted in conformity with the powers reserved to the Rajah by the lease, and that the plaintiff was bound to prove some substantial injury in order to maintain his action.

The plaintiff preferred a special appeal to the High Court, making both the defendants special respondents.

Mr. Woodroffe (Baboos Bhowany Churn Dutt and Rash Behary Ghose with him) for the appellant.

The *Advocate-General*, offg. (Mr. Paul) and the *Legal Remembrancer* (Mr. Bell) (the *Senior Government Pleader*, Baboo Annoda Pershad Banerjee with them) for the minor respondent.

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Mr. Woodroffe.—The Judge is wrong in holding that the plaintiff has no cause of action. The Rajah, after he had executed the lease, had no power to make any settlement with his ryots. By the lease all such power was made over to the plaintiff. By the new settlements, the rents of the ryots have been made invariable, and not liable to enhancement for a period covering the term of the lease; the effect of which is to nullify the terms of the lease authorizing him to enhance the rents. The plaintiff is entitled to maintain this suit, to have the pottah set aside and declared null and void as against him without proving special damage; Story's Eq. Jur., § 698. Distinct consequential relief is prayed for, and, therefore, under the Privy Council Rulings and the High Court decisions, the suit is maintainable. The following cases were cited—*Strimathoo Moothoo Vijia Ragoonadah v. Dorasinga Tevar* (1), *Thakoor Deen Tewarry v. Nawab Syed Ali Hossain Khan* (2), and *Joy Narain Giree v. Greesh Chunder Mytee* (3).

The *Legal Remembrancer* for the respondent.—The present suit is not maintainable; the plaintiff does not allege that any injury has as yet occurred to him, and therefore until the deed is set up against him or any actual damage is suffered by him, he has no cause of action. If the Rajah had no power to grant the pottah, it is a nullity. No person can derive any benefit from it. If it is void *ipso facto*, what is the suit for, and what is the cause of action? But as a matter of fact, the pottah was granted in compliance with the terms for adjustment contained in the lease. The Rajah no doubt had not the power to make new settlements; but this is not a *new* settlement. It was an arrangement really for the benefit of the lessee, and for the purpose of testing the

(1) 15 B. L. R., 83; S. C., L. R., 2 Ind. App., 169.

(2) 13 B. L. R., 427; S. C., L. R., 1 Ind. App., 192.

(3) 15 B. L. R., 172 (n).

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mosfussil collections. The pottah must, therefore, be held good. The plaintiff prays for a simple declaratory decree, and therefore his suit is not maintainable—*Sreenarain Mitter v. Sreemutty Kishen Soondery Dassee* (1), *Thakoor Deen Tewarry v. Nawab Syed Ali Hossain Khan* (2), *Strimathoo Moothoo Vijia Ragoonadah v. Dorasinga Tevar* (3), and *Sadat Ali Khan v. Khajeh Abdool Gunny* (4).

Mr. Woodroffe in reply cited the following cases:—*Howe v. O'Flaharty* (5), *Raja Nilmoney Sing Deo Bahadoor v. Kalee Churn Bhattacharjee* (6), *Sheik Jan Ali v. Khonkar Abdur Kuhma* (7), *Maharajah Rajunder Kishwur Sing Bahadoor v. Sheopursun Misser* (8), and *Kamalo Naicken v. Pitchacootty Chetty* (9).

The judgment of the Court was delivered by

MARKBY, J. (who, after shortly stating the facts, continued):—There can be no doubt whatever that under the ijara the plaintiff from the time the ijara term commenced, and whilst that term lasted, was, and is, the only person capable of granting a valid lease to tenants, or making any valid arrangement as to the collection of rents. The zemindar has granted to the plaintiff for fourteen years his zemindari, "together with the rights." There is nothing to show that the zemindar intended to retain to himself the power of making any settlements with the tenants or the monduls during the term; on the contrary it is expressly said—"You have during the term power as complete as my own to make settlements in the said zemindari," the only qualification added being that these settlements shall not be injurious to the Rajah's reversionary interest. It would require very clear words to qualify this express power, and there are no such words in the document.

(1) 11 B. L. R., 171.

(5) 9 Ir. Chan. Rep., 119.

(2) 13 B. L. R., 427; S. C., L. R.,
 1 Ind. App., 192.

(6) 14 B. L. R., 382; S. C., L. R.,
 2 Ind. App., 83.

(3) 15 B. L. R., 83; S. C., L. R.,
 2 Ind. App., 169.

(7) 6 B. L. R., 154.

(8) 10 Moore's L. A., 438.

(4) 11 B. L. R., 203.

(9) *Ibid*, 386.

[His Lordship then referred to the terms of the pottah, especially to the stipulation, whereby the first defendant's rent was to remain unchanged during the existence of the lease, and continued]:—This is a stipulation which the Rajah had no power whatsoever to make. Indeed, the Legal Remembrancer, who appeared in this Court for the minor defendant, has expressly abandoned the right to interfere between the ijardar and the tenants; and much unnecessary litigation might have been saved if this abandonment had been made earlier.

It is, however, argued for the minor defendant, that the late Rajah did not, by granting the lease, assume to exercise the power of making settlements with the tenants generally, but that by one of the clauses in the ijara lease, he was allowed six months to adjust the rent-roll, so as to show a mofussil jama of Rs. 35,000, and that, in pursuance of this understanding, the rent of the defendant, Suroop Mahoto, was adjusted within the time specified, and that the pottah granted to this defendant merely embodies the terms of the adjustment.

The answer to this is two-fold. First, what is here called the "adjustment" did not in fact take place within the time specified. The time specified in the ijara lease was the six months' interval between the execution of the ijara and its taking effect. Secondly, the Munsif has found that what was done was not any adjustment of the old payment but the fixing of a new payment, and this finding remains undisturbed; to which may be added that the clause, which this pottah contains prohibiting future enhancement, cannot possibly be called "adjustment."

It was, however, said that, even if the Rajah had no power to make this settlement, either as zemindar or under the clause of the ijara lease requiring him to show a mofussil jama of Rs. 35,000, still this suit would not lie; that, in this view, the pottah sought to be set aside was a nullity, that it had not yet been set up against the plaintiff, and that he had been in no way injured by it.

With regard to the question of injury, there is no finding in this case that the plaintiff has as yet suffered any actual injury for which he could have claimed compensation in the way of

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damages. But we entirely dissent from the argument on the part of the minor defendant, that the making of this pottah was beneficial to the plaintiff, or that it was executed with the object that it should be so. It is admitted now that the Rajah could not, at the end of the six months, show a rental of Rs. 35,000. By granting pottahs to the tenants, similar to the one in this case, he tried to raise the rental to the required amount, hoping thereby to escape the penalties which he incurred under the ijara lease. There can be little doubt that he prevailed upon the tenants to accept this advance on the old rents by offering them some kind of advantageous provision in the pottah granted. In the present case, the advantage held out to the tenant was that his rent should not be increased during the term. We think the assertion contained in the pottah that it was granted for the purpose of effecting a *mukabulla* was a mere pretence and rather a shallow one. We think this is what is meant by collusion in the plaint, and that to that extent it is (as found by the Munsif) established by the evidence.

It also seems to be clear that, although the right to make settlements with the tenants after ijara term commenced is not now asserted on behalf of the minor defendant, the plaintiff, upon coming to know that pottahs had been granted after that time, had a right to treat such a proceeding as a violation of his rights under the ijara, which, in my opinion, in fact it was. On the other hand, it was never expressly admitted in this case that this pottah was a nullity, until the close of that argument in this Court. It was in the first instance submitted to the Court to say whether it was or was not a valid document. Subsequently this attitude was departed from, and the validity of the pottah was strenuously asserted and maintained. The grounds upon which its validity was maintained have now been overruled.

Nor, as far as the minor was concerned, was any objection raised in the first Court to the suit being tried. On the contrary, Mr. Harrison said, "if the pottahs granted to the ryot and jote monduls be held by the Court as contrary to the conditions of the ijara pottah, and be on that account set aside, I have no objection thereto. But the ijara pottah, which has been

granted to the plaintiff, is not an ordinary ticca ijara pottah, and it is, therefore, difficult to give a reasonable interpretation to it. I, therefore, pray that the Court will be pleased to take into its consideration the undermentioned facts, in ascertaining what interpretation it is necessary to give to the plaintiff's ijara pottah, in order to pass a judgment on the pottahs granted to the ryots and jote monduls." In all probability Mr. Harrison thought it convenient for the minor that the question should be once for all determined.

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It is also admitted that a very large number of pottahs have been granted under circumstances similar to the present, the validity of all of which is in dispute and must be determined in some way or other. It is certainly desirable that the power of the Rajah to grant these pottahs should be discussed and determined before the plaintiff takes proceedings against the tenants. There is every probability that, when this point is finally decided in one case, it will not be again litigated.

We advert to these circumstances to show that there are reasons why it is desirable to give in this suit a decree which will declare the rights of the plaintiff and the minor defendant respectively, and why it would be a hardship now to hold that the suit does not lie. We cannot, of course, give a decree, however desirable it may be in this particular case, if the law does not permit us to do so.

It is now the settled law that, in the Courts of this country, "a declaratory decree cannot be made, unless there be a right to consequential relief capable of being had either in the same Court or in certain cases in some other Court"—*Strimathoo Moothoo Vija Ragoonadah v. Dorasinga Tevar* (1). But in laying down this rule, we do not understand it to have been the intention of the Privy Council to deny to the Courts of this country the power to grant decrees in any case, in which, independently of the provisions contained in s. 15 of Act VIII of 1859, these Courts have power to grant a decree. It is, therefore, necessary to see what that power is. Now, in this Court, the power is generally the same as that of the Court of Chancery in England. That was the power of the Supreme Court, and it is

(1) 15 B. L. R., 106.

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continued to this Court. And I do not think there is any valid ground for holding that the Courts of the mofussil have a jurisdiction in this respect different from or less than that of this Court. At any rate, in the absence of all special provision or authority upon the subject, it would be difficult to suggest any other guide than the practice of the Court of Chancery in England, and according to the best information we are able to obtain the Court of Chancery in England would in such a case as this entertain the suit. The cases in the Privy Council also support this view. In the case of *Thakoor Deen Tewarry v. Nawab Syed Ali Hossain Khan* (1), the plaintiff, alleging himself to be in possession, obtained a decree to set aside a deed executed by a deceased person in favor of the defendant. The plaintiff claimed to be the heir of the deceased; the defendant, who was in possession, claimed to hold the property under the deed. The Privy Council say "the plaint prayed that the deed might be set aside, which is a prayer for substantive relief." In another recent case, the Privy Council said, speaking of the claim of the plaintiff in that suit, "his requisition of a declaration of a mâl title, by setting aside the false *brahmottra* title alleged by the defendants, is really no more than this, that he should have his title, whatever it was, as a zemindar, free from the allegation of the defendants that they had some other title. If he had applied to set aside a deed set up by the defendants impugning his ordinary title as zemindar, then relief might be granted to him by cancelling that deed; but he cannot obtain relief in the shape of merely setting aside an assertion, which for all that appears may have been merely by word of mouth" (2).

In *Maharajah Rajundur Kishwur Sing Bahadoor v. Sheopursun Misser* (3), the Privy Council dealt with the case of a tenant of a portion of a zemindari who set up against the zemindar a holding different from that which was his true holding, and it seems to be considered that this was an interference with the zemindar's possession for which a suit would lie. Their

(1) 13 B. L. R., 427; S. C., L. R., 1 Ind. App., 192.

(2) *Rajah Nilmoney Singh Deo v. Kalee Churn Bhattacharjee*, 14 B. L. R., 382.

(3) 10 Moore's I. A., 438.

Lordships say, "if this tenure be not interposed between the zemindar and the cultivators, the ordinary relation between him and them exists; but if it be interposed, the zemindar's general proprietary title to the collections is gone, and in lieu of it he is simply entitled to some jama from the mesne proprietors. It is obvious, then, that the assertion of such a title is a serious prejudice to a zemindar, and may materially interfere with the successful management of his zemindari. Such an intermediate tenure cuts off the possession, that is the zemindar's title to the rents and profits immediately derived from the cultivators" (1). In the earlier case of *Kamala Naicken v. Pitchacooty Chetty* (2), the facts were somewhat similar to the present. A zemindar, after granting to the plaintiff a lease of his zemindari, issued notices to the tenants not to pay the rents to the lessee. No other interference with the rights of the lessee appears to have taken place, and no actual refusal to pay rent appears to have been alleged. The High Court gave a decree, declaring that the plaintiff was entitled to specific performance of the lease and to the possession and enjoyment of the zemindari under the terms of the lease. The Privy Council did not approve of the declaration as to the specific performance, but affirmed the rest of the decree.

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These cases appear to us to justify this Court in making a decree in this case.

The plaintiff has not asked for any injunction, though probably he might have done so, and only asks that the pottah should be set aside as against him. We think a decree substantially to that effect may be made. The decree of the lower Appellate Court dismissing the suit will therefore be set aside, and, instead thereof, there will be a decree in the following form:—that the pottah of 29th Srabun 1280 granted by the Rajah to the defendant No. 1 be as between the plaintiff and the defendants in this suit set aside, and the plaintiff declared entitled to the possession and enjoyment of the zemindari under the terms of the ijara lease of the 12th Falgoon 1279 the aforesaid pottah notwithstanding.

Appeal allowed.

(1) 10 Moore's I. A., 449.

(2) 10 Moore's I. A., 386.

ORIGINAL CIVIL.

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Macpherson.

1876
Sept 6.

THE CORINGA OIL COMPANY, LIMITED (DEFENDANTS) v.
KOEGLER AND OTHERS (PLAINTIFFS).

*Contract Act (IX of 1872), s. 28—Agreement to refer to Arbitration—
Suit for Damages for Breach of Contract—Suit for Specific Performance of Contract to refer.*

A contract entered into between the plaintiffs and the defendants contained a clause, that "in case of any dispute the same to be decided by two competent London brokers—one to be appointed by the buyers' and the other by the sellers' agents; such brokers' decision to be final," but did not provide that no action should be brought till such decision was pronounced. Matter of dispute arising, the defendants refused to appoint an arbitrator. In a suit for damages for breach of the contract, *held* that the contract was not one of the nature referred to in s. 28, Act IX of 1872. That section only refers to contracts which wholly or partially prohibit the parties absolutely from having recourse to a Court of Law. The first exception in that section applies only to a class of contracts where the parties have agreed that no action shall be brought, until some question of amount has first been decided by the arbitrators.

Semle:—A suit will not lie to enforce an agreement to refer to arbitration, even in the case referred to in the first exception to s. 28 of Act IX of 1872.

APPEAL from a decision of Phear, J., dated 31st of May 1875, and a decision of Pontifex, J., dated the 22nd of May 1876.

The suit was one for damages for breach of contract. The facts are fully set forth in the report of the case before Phear, J., in the Court below (1). The case first came on for settlement of issues, and an issue was raised as to whether the plaint disclosed any cause of action, which was decided in favor of the plaintiff. The case was then heard before Pontifex, J., on the merits, and a decree given for the plaintiffs. The defendants appealed from both decisions, but the appeal from the latter decision was confined exclusively to the facts of the case,

and is therefore omitted from this report. The ground of appeal from the decision of Phear, J., was "That such a contract, as is mentioned in Act IX of 1872, s. 28, Exception I was proved to exist between the plaintiffs and the defendant company in respect of the subject of this suit, and that the existence of such a contract was and is by the said Act a bar to this suit."

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Mr. *Evans* and Mr. *Macrae* for the appellants.

Mr. *Branson* and Mr. *Jackson* for the respondents.

Mr. *Evans* contended that the contract was one which clearly came within s. 28 of Act IX of 1872, and fulfilled all the requirements of Exception I of that section, and therefore inasmuch as the present suit was not one for specific performance of the contract to refer, or for the recovery of the amount awarded, the only suits which by the express words of the section could be brought in such a case, the suit was barred. By the express words of the Contract Act, the plaintiffs' proper course was a suit for specific performance of the agreement to refer. The learned Judge in the Court below holds that to bring an agreement within Exception I of s. 28, the agreement must exclude the Courts in all respects except the matter which is the subject of the award, but it is submitted this is not so; it amounts to saying that a case cannot come under the saving of Exception I, unless it would but for the exception have come under the rule laid down in the original section; i.e., this contract cannot come under the exception though within it, because it does not contain a clause excluding the jurisdiction of the Courts on matters other than the subject referred to arbitration. It is submitted that this contract is not only not illegal but is a bar to the present suit.

Mr. *Branson*, for the respondent, relied on the judgment of the Court below, beginning at p. 50 of the report in L. L. R., 1 Calc. The contract does not come within s. 28, because it does not contain a clause that the Courts shall be excluded in all matters except what is decided by the arbitrators. The contract must come within the class of contracts mentioned in the rule before the benefit of the exception can be taken;

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and, unless it comes strictly within the section, it should be held not to be within it at all, because it would leave the plaintiffs without any remedy, as pointed out by Phear, J. If they had sued for specific performance it is difficult to see, even if the action were maintainable, how they could have obtained any practical relief.

Mr. *Macrae* in reply.—A decree for specific performance of a contract to refer can be enforced (see ss. 200, 326, Act VIII of 1859) by proceeding against the defendants for contempt of the order of the Court. The plaintiffs too might have sued for breach of the contract to refer. But they have brought a suit which the legislature has expressly prohibited.

The following judgments were delivered :—

GARTH, C.J.—The first point which we have to decide is that which was argued before Phear, J., in the Court below, and his judgment upon which is reported in the January number of the Indian Law Reports, page 47.

The defendant contends, that the contract upon which this suit is founded is one of the class described in the 1st Exception of s. 28 of the Contract Act, and, consequently, that as the dispute which has arisen between him and the plaintiffs remains undecided by arbitration, no suit can be brought upon it, except for a specific performance of the agreement to refer. Certainly, as Phear, J., very truly observes, the plaintiffs, if this were so would be in an unfortunate position, because the defendant has distinctly refused to refer the dispute to arbitration; and, as according to the present law, no suit will lie to compel him to refer, the defendant, if he is right in his contention, may by his own breach of the contract, deprive the plaintiffs of any remedy whatever. Happily for the interests of justice in the present case, we think it quite clear that Phear, J. is right, and that the contract is not one of those described in the 28th section of the Contract Act.

That section does not apply to contracts which merely contain a provision for referring disputes to arbitration, but to those which wholly or partially prohibit the parties from having recourse to a

Court of Law. If, for instance, a contract were to contain a stipulation, that no action should be brought upon it, that stipulation would, under the first part of s. 28, be void, because it would restrict both parties from enforcing their rights under the contract in the ordinary legal tribunals; and so, if a contract were to contain a double stipulation, that any dispute between the parties should be settled by arbitration, and that neither party should enforce their rights under it in a Court of Law, that would be a valid stipulation, so far as regards its first branch; *viz.*, that all disputes between the parties should be referred to arbitration, because that of itself would not have the effect of ousting the jurisdiction of the Courts; but the latter branch of the stipulation would be void, because by that the jurisdiction of the Court would be necessarily excluded.

Then the 1st exception in the 28th section applies only to a class of contracts where (as in the cases of *Scott v. Avery* (1) and *Tredwen v. Holman* (2), cited by Phear, J.) the parties have agreed that no action shall be brought until some question of amount has first been decided by a reference; as, for instance, the amount of damage which the assured has sustained in a marine or fire policy. Such an agreement does not exclude the jurisdiction of the Courts; it only stays the plaintiffs' hand till some particular amount of money has been first ascertained by reference.

Now it is clear that in this case the contract does not exclude the jurisdiction of the Courts at all; it merely provides, as hundreds of commercial contracts provide, for a reference of disputes to arbitration, and it is perfectly clear law that such a clause does not oust the jurisdiction of the Courts. . . .

This appeal will, therefore, be dismissed with costs on scale No. 2.

MACPHERSON, J.—I see no reason to differ from Phear, J., in the conclusions he arrived at on the point of law, and I agree in thinking the appeal should be dismissed with costs.

Appeal dismissed.

Attorney for the appellants: Mr. *Hechle*.

Attorney for the respondents: Mr. *Pittar*.

(1) 5 H. L. C., 811.

(2) 8 Jur., N. S., 1080; S. C., 1 H. & C., 72.

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Before Mr. Justice Pontifex.

1876
June 19.

JOHURRA BIBEE v. SREEGOPAL MISSER AND OTHERS.

*Hindu Law—Mitakshara—Widow—Maintenance—Joint Ancestral Business—
Debts incurred by Manager of Joint Family in trading.*

A joint family property acquired and maintained by the profits of trade is subject to all the liabilities of that trade.

Ramlal Thakursidas v. Lakmichand (1) followed.

THIS was a suit for a declaration, that the plaintiff as widow of one Monohur Lall was entitled to maintenance out of the rents and profits of a house, No. 13, Roopchand Roy's Street, in Calcutta. For the purposes of this report it may be assumed that the said Monohur Lall, together with his father Luchmeenarain and his uncle Hurrynarain, formed a Hindoo joint family subject to the Mitakshara law.

The house in question was acquired by Luchmeenarain, partly out of funds received by him from the estate of his father Chotai Lall, and partly out of the profits of a business for the sale of shawls, silks, and Benares piece-goods, which he carried on with money, portions of which were given him by his father, and portions received by him from his estate. Some time after the acquisition of the said house, Monohur Lall died, leaving the plaintiff, his father Luchmeenarain and his uncle Hurrynarain surviving him; and the plaintiff resided in the house until the year 1866 when Luchmeenarain died and Hurrynarain took possession of the whole family estate including the house and the business. Disputes then arose between the plaintiff and Hurrynarain, and litigation ensued, but after some negotiation, it was agreed that she should continue to reside in the house, and that Hurrynarain should provide her with maintenance and money for the performance of her religious ceremonies, which he continued to do until April 1875. On 17th April 1875, Hurrynarain, having failed in the business, filed his petition in the Insolvent Court, and the whole of his estate and effects

(1) 1 Bom. H. C., App., 51, at p. 71.

became vested in the Official Assignee. From that time the plaintiff received no maintenance, nor money for religious ceremonies. On 5th August 1875, the Official Assignee sold the house to Sreegopal Misser, who called on the plaintiff to remove from the house.

In the present suit, which was brought against the Official Assignee and Sreegopal, the plaintiff submitted that, as the widow of Monohur Lall, she was by Hindu law entitled to be maintained and supplied with money for religious ceremonies out of the property which belonged to the family; that the defendant, Sreegopal Misser, purchased the house with full notice of the plaintiff's right to maintenance from the rents and profits thereof; and alleged that there was property in the hands of the Official Assignee forming part of the estate. She prayed that she might be declared entitled to maintenance out of the rents and profits of the house; or that it might be declared that she was, as the widow of Monohur Lall, entitled to be maintained and supplied with money for her religious ceremonies out of the estate in the hands of the Official Assignee; that the amount of such maintenance might be fixed; and that she might be declared entitled to have a suitable residence provided for her.

The Official Assignee, in his written statement, stated that Hurrynarain described himself in his petition of insolvency as carrying on business in the name of Luchmeenarain and Hurrynarain as merchants, and that the sale and conveyance to Sreegopal Misser was of the right, title, and interest of Hurrynarain as vested in him. He submitted his right and interest in the suit to the decision of the Court.

The defendant, Sreegopal Misser, stated that he had purchased the said house and premises, but that he had never obtained possession thereof, and had instituted a suit with the object of obtaining such possession.

The case came on for settlement of issues.

Mr. *Branson* and Mr. *Bonnerjee* for the plaintiff.

Mr. *Kennedy* and Mr. *Ingram* for the Official Assignee.

Mr. *Evans* and Mr. *Macgregor* for the other defendant.

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Mr. Branson.—Under the Mitakshara law, a Hindu widow's charge for maintenance is a charge on the estate of her deceased husband and on every part of it; see *Ramchandra Dikshit v. Savitribai* (1). This is not so however by the Bengal law, by which she only has such charge against one who takes the estate with notice of her claim—*S. M. Bhagabati Dasi v. Kanailal Mitter* (2), *Mussamut Golab Koonwur v. Collector of Benares* (3), and *Khettramani Dasi v. Kashinath Das* (4). The last case was one where a widow sued her father-in-law for maintenance, and it was held under the law in Bengal that she was not entitled to it; but it is submitted it would be different by Mitakshara law, where the son is from his birth a co-sharer with his father. [PONTIFEX, J., referred to *Girdharee Lall v. Kanto Lall* (5) as to the power of alienation of a father as against his sons by Mitakshara law. Why should the widow have a greater right to complain of alienation than her husband: he would be bound by it.] In this case, the plaintiff alleges it was alienated and purchased with notice of her claim.

As to her right to residence, the case of *Mangua Debi v. Dinanath Bose* (6) decides that in her favour. [PONTIFEX, J.—That would not be to the exclusion of Hurrynarain; if there were only room for him and his family, she would have no right of residence in the family, dwelling-house.] In that case, she would probably be entitled to maintenance to enable her to reside elsewhere. It is submitted the plaintiff here is at least entitled to an inquiry as to her maintenance and residence.

Mr. Kennedy for the Official Assignee.—In a joint family by Mitakshara law, no one has any right to a definite share; it is a kind of corporation. Right to maintenance is subject to the ordinary obligations of the joint family. In this case, the insolvent was carrying on an ancestral family business on behalf of the joint family, and if it became indebted, he had a right to pledge the credit of the family to pay the debts—*Ramlal*

(1) 4 Bom. H. C., A. C., 73.

(4) 2 B. L. R., A. C., 15.

(2) 8 B. L. R., 225.

(5) L. R., 1 Ind. App., 321; S. C.,

(3) 4 Moore's I. A., 246.

14 B. L. R., 187.

(6) 4 B. L. R., O. C., 72.

Thakursidas v. Lakmichand (1). A widow cannot have a greater right than her husband would have had, or be in a better position than one who on a partition would be entitled to a share of the property. Even admitting her right to reasonable maintenance, there is, by the justifiable conduct of the manager of the family, no property out of which she can be maintained. Her credit to the amount of her claim was pledged to carry on the business. If she has such a right, she can come in as a creditor and prove her claim in the usual way.

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Mr. *Evans* for the defendant Sreegopal Misser.—There is no cause of action against the purchaser. The plaintiff, as a member of the joint family, would be liable for the losses, just as she would be entitled to benefit by its gains; her maintenance would increase with any increase of the business. If the trading debts of the business increase, so that the business fails, she will have no claim to maintenance, not at any rate in priority to the debts; she admits that but for this business she would have no maintenance. If the debts are improperly incurred, the Court might say the alienation should not be valid, or the debts should not be paid, but not in such a case as this. As to residence, the case of *Mangala Debi v. Dinanath Bose* (2) does not lay down that the widow is absolutely, and in all circumstances, entitled to reside in the family dwelling-house.

Mr. *Branson* in reply.—The maintenance of a Hindu widow by Mitakshara law would not be liable to variation with the increase or decrease of the family business. She is not part of the joint family so as to entitle her to any increase. She is only entitled to that share which her husband would have had a right to on partition: she is to that amount a creditor of the estate. Under Mitakshara law, the widow cannot obtain a partition when she sees her rights endangered as she can by the Bengal law. She is entitled to maintenance notwithstanding alienation—*Heera Lall v. Mussamut Kousillah* (3).

(1) 1 Bom. H. C., App., 51, at p. 71.

(2) 4 B. L. R. O. C., 72.

(3) 2 Agra H. C., 42.

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PONTIFEX, J.—The plaintiff in this case is the widow of Monohur Lall, who died in the lifetime of his father Luchmeenarain Kuppoor Khettry. Luchmeenarain left a brother joint in estate, Hurrynarain Kuppoor Khettry, who subsequently became insolvent. The parties were and are governed by the Mitakshara law.

The plaintiff claims that, as the widow of Monohur Lall, she has a right to be maintained and supplied with money for the performance of her religious ceremonies out of the rents and profits of the house, No. 13, Roopchand Roy's Street, in Calcutta as property which belonged to the joint family, and that any interest which passed to the Official Assignee as representing Hurrynarain the surviving member of the joint family passed subject to such rights. A great many cases have been cited in support of the proposition, that a widow has what is called a lien for maintenance on the joint estate and particularly in a Mitakshara family. It is not necessary for me to give any opinion on the ordinary case, where the surviving members of a joint family contract to convey without reserving the widow's rights, for in my opinion the present is a special case which does not fall within the ordinary rule. The plaintiff, in her plaint, admits that the property, out of which she claims maintenance, was acquired by her father-in-law partly by money supplied to him by his father, and partly out of the profits of a business for the sale of shawls, silks, and Benares piece-goods which he carried on with moneys, portions of which were given to him by his father, and portions received by him from his estate. In my opinion, the business established and carried on with moneys so derived must be treated as a joint family business, and in fact the insolvent was carrying on such business at the date of his insolvency as appears by the written statement of the Official Assignee.

It was in respect of his debts incurred in such business that Hurrynarain was adjudicated insolvent. And it is not alleged that any of the debts were incurred improperly, or otherwise than in the due course of business. The debts of the family business became greater than could be provided for by the insolvent or the joint family property, and the insolvent accord-

ingly filed his petition. It seems to me that the law is correctly laid down in the case of *Ramlal Thakursidas v. Lakmi-chand* (1), that persons carrying on a family business in the profits of which all the members of the family would participate must have authority to pledge the joint family property and credit for the ordinary purposes of the business. And therefore that debts honestly incurred in carrying on such business must override the rights of all members of the joint family in property acquired with funds derived from the joint business. In other words, it seems to me that those who claim to participate in the benefits must also be subject to the liabilities of the joint business, and by the plaintiff's own admission, the joint family title to the house, in respect of which she claims, would not have existed, except for the profits of the business. I had some difficulty at first in seeing how the house could vest in the Official Assignee without being subject to the claim of the plaintiff; but the debts being joint business debts and as such, debts for which business creditors could have attached the property, the whole interest in the property vested in my opinion in the Official Assignee; for the proceedings in insolvency are in fact substituted for separate suits by creditors. In this case, the property was put up for sale by the Official Assignee, subject to the plaintiff's right (if any) to maintenance, and was so conveyed. The effect of such conveyance is, that the purchaser took only such estate as the Official Assignee could give, but if the plaintiff had no right the purchaser would take an absolute estate. In my opinion, the plaintiff, under the circumstances of this case, has no right as against joint creditors to maintenance or residence, out of or in the house in question, and as the plaint is confined to this particular house, there is no case made for any further enquiry. At all events the enquiry can't be made in this suit against the present defendants, though there may be a right to an enquiry against the Official Assignee separately. I am however of opinion that the plaintiff has no claim which can be enforced against any part of the joint estate, until after payment of the

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(1) 1 Bom. H. C., App., 51, at p. 71.

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joint trade debts. The Official Assignee must have his cost out of the estate of the insolvent, and Mr. Evans' client must have his costs from the plaintiff.

Suit dismissed.

Attorney for the plaintiff: Baboo *Joykissen Gangooly*.

Attorneys for the Official Assignee: Messrs. *Dignam and Robinson*.

Attorney for the other defendant: Mr. *Carapiet*.

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Macpherson.

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August 31.

SIB CHUNDER MULLICK v. KISSEN DYAL OPADHYA
AND ANOTHER.

Small Cause Court Act (IX of 1850), s. 42—Power to restore Case struck off for Default in Appearance.

A Court of Small Causes, constituted under Act IX of 1850, can, during the same day, and at the same sitting of the Court, *ex parte* restore a cause once struck out under s. 42, though the order for striking off may have been duly recorded. In such a case, it would be open to the defendant to apply to set aside such *ex parte* order, and the sufficiency of the grounds of the application would be a question for the discretion of the Judge.

THE following case was referred to the High Court, under s. 7, Act XXVI of 1864, by the first Judge of the Small Cause Court, Calcutta.

"On the 8th of February 1876, the plaintiff instituted a suit against the defendants in this Court, to recover Rs. 1,000 due on a balance of account for goods sold and delivered, the plaintiff abandoning all excess. The summons was returnable on the 15th of February 1876. On the 15th of February 1876, the cause was called on in due course and adjourned by me—there being no time to hear it on that day—to the 6th of March 1876. On the 6th of March 1876, the cause was again called on in due course, but as neither the plaintiff nor any one on his behalf appeared, I ordered the case to be struck

out, acting under s. 42 of Act IX of 1850. A few minutes after I had so ordered the cause to be struck out, Mr. C. F. Pittar, who had appeared as the plaintiff's attorney on the first day the cause was called on, made an application to me to restore the cause; and having satisfied me that the absence both of the plaintiff and of himself had arisen from a reasonable mistake, I ordered the cause to be restored, and also ordered a fresh summons to issue, on payment of full costs, returnable on the 20th of March 1876. At the time Mr. Pittar made his application, the pleader of the defendants was not present, and the order for striking out had been entered on the record as follows:—"Plaintiff absent; second defendant with pleader present; struck off." This order had been initialed by the clerk, but not signed by me, though, it would, in due course, have been duly authenticated by me under s. 81 of Act IX of 1850. On the 20th of March 1876, on the cause being called on, and before the plaintiff had gone into any evidence, Mr. Arrakiel, who appeared as the pleader of one of the defendants, objected to my right to hear the cause, on the ground that, when once a cause has been struck out, the Court has no power to restore it.

"I am of opinion that the objection is fatal to the plaintiff, for though it seems that some Judges of this Court have, on several occasions, restored causes previously struck out, other Judges again have refused, on the ground that they have no power so to do.

"S. 37 of Act IX of 1850 gives this Court power to try in a summary way, and give judgment in cases where the plaintiff appears and the defendant also appears and answers; and s. 42 of the same Act, which is a repetition of 9 & 10 Vict., c. 95, s. 79 (County Courts Act, 1846) gives the Court power to strike out the cause where the plaintiff shall not appear, and also to nonsuit the plaintiff if he shall fail to prove his demand, and give judgment for the defendant; but no express power is given to this Court to restore a cause when struck out.

"But it has been argued that s. 41 of Act IX of 1850, which gives the Judges of this Court power to make rules for regu-

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lating the practice and proceedings of the Court, also gives this Court power in any case not expressly provided for by the Act, or by the said rules, to adopt and apply the general principles of practice in the Supreme Court, that is to say, the High Court, to actions and proceedings in this Court. Further, that by s. 110 of the Code of Civil Procedure, the High Court has power under that section, even after it has dismissed a suit, to issue a fresh summons on the plaint already filed—in other words, to restore the case. The Code of Civil Procedure, however, with the exception of four sections (which do not include s. 110), especially extended under the provisions of s. 15 of Act XXVI of 1864, is not applicable to this Court, so that, if I were to act under that section, I should in effect be extending to the Court a section of a Code which is clearly not applicable to it. Under any circumstances, I think it a question more of procedure than practice, and holding such an opinion it is clear that s. 41 of Act IX of 1850 would not be applicable to the present question.

“There is a case, however, of *Jones v. Jones* (1), in which Coleridge, J., says:—‘I do not mean to say but that a Judge might alter his judgment on the same day during the sitting of the Court, but he can have no authority to alter it in his chambers and behind the back of the parties, after the Court has been broken up.’ But this is a mere *dictum*, and, indeed, would hardly apply to this case, where one of the parties was absent. I think, therefore, that when once an order of such a nature has been made and correctly recorded, this Court has no power to alter such order *ex parte*, unless authorized by the Act so to do.

“I have been requested by the plaintiff’s attorney, under s. 7 of Act XXVI of 1864, to reserve the following question for the opinion of the High Court:—

“‘Whether a Court of Small Causes, constituted under Act IX of 1850, can, during the same day, at the same sitting of the Court, *ex parte* restore a cause once struck out under s. 42 of the same Act, when the order of striking out has been made and correctly recorded.’

(1) 5 D. & L., 628; S. C., 1 Cox & Macrae’s C. C. Cases, 92.

“My judgment, therefore, contingent in the opinion of the High Court on the above question will be for the defendant.”

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Mr. *Macrae*, for the plaintiff, contended that even if the Judge could not, under s. 41, have adopted the portion of the Civil Procedure Code, s. 119, under which a case of this kind might have been restored in the High Court, the Judge might have restored the case under s. 53 of Act IX of 1850, by “ordering a new trial;” there would perhaps be some doubt as to whether this section would apply to a case which had been dismissed for default, as it might be said no actual trial had taken place. There is no express power in the Small Cause Court Act to restore cases. In a case under the corresponding section of the County Courts Act (9 & 10 Vict., c. 95, s. 89), it was held that the County Court Judge had a discretionary power to grant a new trial, and that a rule of practice passed by the Judges, as to the exercise of that power, did not interfere with such discretion: *In re Carter v. Smith* (1). [GARTH, C. J.—There is no doubt that cases are frequently restored in the County Courts. MACPHERSON, J.—Was there any default under s. 42 by the plaintiff? it seems he did appear on the day the case was struck off.] That appears to be so, and, therefore, on a strict construction of the section, he might be held to have made no default in appearing. The Judge says the case was a proper one to restore, if he had the power. [GARTH, C. J.—Would there not be an inherent power in the Court to correct a manifest injustice in a case like this by restoring the case? (2)] Refers to s. 41, Act IX of 1850. The Small Cause Court, like all Courts, would have an inherent power to correct mistakes, but it is submitted that s. 53 would, on the widest construction that can be given to it, apply to any order made by the Judge, and therefore he was not debarred from restoring this case.

No one appeared for the defendant.

(1) 24 L. J., Q. B., 141.

(2) See *Deen Dyal Paramanick v. Ram Coomar Chowdhry*, 9 W. R., 284.

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The opinion of the High Court was delivered by

GARTH, C. J.—We are of opinion that a Court of Small Causes, constituted under Act IX of 1850, can, during the same day, and at the same sitting of the Court, *ex parte* restore a cause once struck out under s. 42, though the order for striking off may have been duly recorded.

It is always, of course, open to the defendant in such a case to apply to the Court upon sufficient grounds to set aside the *ex parte* order; and the sufficiency of such grounds would in each case be a question for the discretion of the Judge.

The sum of Rs. 230, which has been brought into Court by the plaintiff in this case, will be refunded to him.

Attorney for the plaintiff: Mr. Pittar.

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—————, ss. 92 & 93— <i>Interim Injunction—Suit for specific Performance of Contract to give in Marriage—Hindu Law—Ceremonies of Betrothal.</i> Sections 92 & 93 of Act VIII of 1859 are not applicable to a suit for specific performance of a contract to give in marriage, and the Court will not grant an interim injunction to restrain the defendant from making another marriage with a third person. <i>Per GLOVER, J.</i> —A suit for specific performance of a contract to give in marriage will not lie: the remedy is an action for damages for breach of the contract. The ceremony of betrothal does not, by Hindu law, amount to a binding irrevocable contract, of which the Court would give specific performance.	
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—1865—XI, ss. 6 & 12— <i>Civil Court, Jurisdiction of—Mofussil Small Cause Court—Act XXIII of 1861, s. 27—Special Appeal.</i> A suit for a balance due on account of rents collected from the plaintiffs' zemindaris by the defendants' father acting as agent of the plaintiffs, is a suit in which money is claimed as due on a contract within the meaning of s. 6, Act XI of 1865. Where the amount claimed in such a suit does not exceed Rs. 500, it is cognizable by a Small Cause Court, notwithstanding it may be necessary to go into the accounts of both parties to determine what is due. Where such a suit for an amount under Rs. 500 is entertained by the Civil Court within the local jurisdiction of a Small Cause Court, a special appeal lies to the High Court,—s. 27 of Act XXIII of 1861 only applying to a suit which is properly brought in a Civil Court, because there is no Small Cause Court having jurisdiction to try it.	
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(PRIVY COUNCIL APPEALS ACT)— <i>Letters Patent, 1862, cl. 39—24 & 25 Vict., c. 104, s. 9—24 & 25 Vict., c. 67 (Indian Councils' Act), s. 22—Power of Indian Legislature.</i> The provision in s. 5 of Act VI of 1874 that where there are concurrent decisions on facts, the case must, in order to give a right of appeal to the Privy Council, involve some substantial question of law, is not <i>ultra vires</i> of the power of the Indian Legislature as being a curtailment of the jurisdiction given to the High Courts by the Letters Patent, 1865, cl. 39.	
Clause 39 of the Letters Patent of 1865 does not rest for its authority on the 24 & 25 Vict., c. 104, and was not inserted in pursuance of that Act; consequently any power which it gives to admit an appeal to the Privy Council from a decision of the High Court on its Appellate Side, is not one of the powers which the High Court is, by the first part of s. 9 of 24 & 25 Vict., c. 104, commanded to exercise.	

S. 22 of 24 & 25 Vict., c. 67, must be read with ss. 9 and 11 of 24 & 25 Vict., c. 104. By the express words of s. 9 all previously existing powers were reserved to the High Court, provided the Letters Patent did not interfere with them, and as to these powers the Governor-General in Council is expressly empowered to legislate. Even if, therefore, the power to admit an appeal to the Privy Council were conferred by the Letters Patent, under the authority of 24 & 25 Vict., c. 104, it was, not being a new power, subject to the legislative control of the Governor-General in Council.

The *ratio decidendi* in *The Queen v. Meares* dissented from.

Where there were two concurrent decisions on facts, an application to appeal to the Privy Council was refused, the right of appeal from a decision of the High Court on its Appellate Side, simply on the ground that the subject-matter of the suit was above Rs. 10,000, having been taken away by Act VI of 1874, s. 5.

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ADOPTION, SUIT TO SET ASIDE—*Infant Marriage—Presumption as to Age—Power of Minor to give permission to adopt—Regs. X of 1793, s. 33, and XXVI of 1793, s. 2—Minor under Court of Wards—Onus Probandi—Estoppel.*] The foundation for infant-marriages among Hindus is the religious obligation which is supposed to lie on parents to provide for a daughter, so soon as she is *matura viro*, a husband capable of procreating children; the custom being that, when that period arrives, the infant wife permanently quits her father's house, to which she had returned after the celebration of the marriage ceremony, for that of her husband. The presumption, therefore, is, that the husband, when called upon to receive his wife for permanent cohabitation, has attained the full age of adolescence and also the age which the law fixes as that of discretion.

According to the Hindu law prevalent in Bengal, a lad of the age of fifteen is regarded as having attained the age of discretion, and as competent to adopt, or to give authority to adopt, a son.

Semble.—The operation of s. 33, Reg. X of 1793, which, read together with s. 2, Reg. XXVI of 1793, prohibits a landholder under the age of eighteen from making an adoption without the consent of the Court of Wards, is confined to persons who are under the guardianship of the Court of Wards.

Quære, whether a decree in favour of the adoption passed in a suit by a reverser to set aside an adoption is binding on any reverser except the plaintiff; and whether a decision in such a suit adverse to the adoption would bind the adopted son as between himself and any other than the plaintiff.

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APPEAL— <i>Act XXVII of 1860—Deposit of Security by Person entitled to a Certificate.</i>] No appeal lies under Act XXVII of 1860 on a question of the deposit of security by a person who has been declared entitled to a certificate under the Act.	
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—— <i>Letters Patent, 1865, cl. 15—Act VI of 1874—Order granting Appeal to Privy Council.</i>] Under cl. 15 of the Letters Patent no appeal lies to the High Court from an order of the Judge in the Privy Council Department, granting a certificate that a case is a fit case for appeal to Her Majesty in Council.	
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—— <i>Reg. VIII of 1819, s. 6—24 & 25 Vict., c. 104, s. 15.</i>] There is no appeal from an order made by the Civil Court under s. 6 of Regulation VIII of 1819.	
<i>Per</i> BIRCH, J.—A party who has preferred an appeal to the High Court when the law gave him no right of appeal is not entitled upon the hearing to ask the Court to treat it as an application for the exercise of its extraordinary jurisdiction under s. 15 of 24 & 25 Vict. c. 104.	
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—— TO PRIVY COUNCIL— <i>Dismissal of Appeal for Default in Deposit of Security and in transcribing Record—Act VI of 1874, ss. 11, 14, & 15.</i>] On an application to stay proceedings in an appeal to the Privy Council, which had been presented on 2nd July 1874 from a decision of the High Court on its Original Side, it appeared that no deposit had been made by the appellant to defray the costs of transcribing, &c., as provided by s. 11, Act VI of 1874; that no steps had been taken to prosecute the appeal; and that no security had been deposited for the costs of the respondent since the petition of appeal was presented. The Court granted a rule calling on the appellant to show cause why the proceedings on appeal should not be stayed, and on his not appearing to show cause ordered that the appeal should be struck off the file.	
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of law for the consideration of the Full Bench, and the answer of the Full Bench is not framed as a decree or as an interlocutory order, and an appeal is brought to Her Majesty in Council, it is open to the respondent, without a cross-appeal, to object to the correctness of the answer given by the Full Bench on the question of law referred.

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BENGAL ACT III OF 1864, s. 33— <i>Municipal Commissioners—Appeal against Assessment—Jurisdiction of Civil Court.</i>] A suit to set aside an order made on an appeal under s. 33 of Beng. Act III of 1864 to the Municipal Commissioners against a rate assessment, and to reduce the tax levied by them under that Act, on the ground that they have tried the appeal in an improper way, and have exceeded their powers and acted contrary to the provisions of the Act, cannot be maintained in the Civil Courts. The decision of the Commissioners in such an appeal is absolutely final.	
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——— VIII OF 1869, s. 27— <i>Limitation—Suit for Possession with Mesne Profits—Defendants—Title.</i>] A suit for possession of certain lands “by establishing the plaintiff’s howla right,” and for mesne profits, brought against a shareholder of the talook in which the lands are situated, a former talookdar, and certain ryots who paid rent to the first defendant, is not a suit to recover the occupancy of the land from which the plaintiff has been illegally ejected by the person entitled to receive the rent, within the meaning of s. 27 of Beng. Act VIII of 1869, and is not governed by the limitation provided by that section.	
KHAJAH ASHANOOLLAH <i>v.</i> RAMDHONE BHUTTACHARJEE	325
———, s. 98— <i>Suit for value of Crops—Distraint—Jurisdiction—Small Cause Court.</i>] The plaintiff made a complaint to the Magistrate against the defendant, his landlord, for forcibly carrying away his crops; whereupon the defendant was tried, convicted of theft, and punished. The plaintiff then instituted a suit against the defendant in the Munsif’s Court, apparently under s. 95 of Beng. Act VIII of	

1869, and obtained a decree declaring the distraint to be illegal, and directing the crops to be given up to him. The defendant offered to give up a smaller quantity than was mentioned in the decree. The plaintiff refused to take the same, and brought a suit in the Small Cause Court to recover the value of the quantity he had claimed before the Munsif and something additional. <i>Held</i> , that the Small Cause Court had no jurisdiction, and that the suit ought to have been brought under s. 98 of Beng. Act VII of 1869.	
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<i>See</i> ACT VIII OF 1859, ss. 92 AND 93.	
BILLS OF EXCHANGE ACT (V OF 1866)— <i>Suit on Promissory Note payable by Instalments.</i>] Where a promissory note is payable by instalments, and contains a stipulation that, on default in payment of the first instalment, the whole amount is to become due, a suit to recover the whole amount on default made in payment of the first instalment cannot be brought under Act V of 1866.	
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CHARITABLE GIFT— <i>Failure of Object—Cyprus Performance.</i>] The doctrine of <i>cyprus</i> as applied to charities rests on the view that charity in the abstr act is the <i>substance</i> of the gift, and the particular disposition merely the <i>mode</i> , so that, in the eye of the Court, the gift, notwithstanding	

the particular disposition may not be capable of execution, subsists as a legacy which never fails and cannot lapse.

It cannot be laid down as a general principle that the *cypres* doctrine is displaced where the residuary bequest is to a charity, or that among charities there is anything analogous to the benefit of survivorship, since cases may easily be supposed where the charitable object of the residuary clause is so limited in its scope, or requires so small an amount to satisfy it, that it would be absurd to allow a large fund bequeathed to a particular charity to fall into it.

On the failure of a specific charitable bequest, jurisdiction arises to act on the *cypres* doctrine, whether the residue be given in charity or not, unless upon the construction of the will a direction can be implied that the bequest if it falls should go to the residue.

In applying the *cypres* doctrine, regard may be had to the other objects of the testator's bounty, but primary consideration is to be given to the gift which has failed, and to a search for objects akin to it. The character of a charity as being for the relief of misery in a particular locality may guide the Court in framing a *cypres* scheme to benefit that locality.

Unless the *cypres* scheme framed by the lower Court be plainly wrong, a Court of Appeal should not interfere with it.

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— ACT (Act IX of 1872), s. 28, *Exception 1—Agreement to refer to Arbitration, Revocation of—Common Law Procedure Act of 1854 (17 & 18 Vict., c. 125)—9 & 10 Will. III, c. 15—3 & 4 Will. IV, c. 42—Specific Performance of Agreement to refer—Suit for damages for Breach of Agreement to refer.* A contract entered into by the plaintiffs with the defendants contained a clause providing, in case of any dispute, for a reference to two arbitrators in England, one to be appointed by each of the contracting parties, whose decision in the matter was to be final. The contract contained no provision for making the submission to arbitration a rule of Court, so that 9 & 10 Will. III, c. 15, and 3 & 4 Will. IV, c. 42, s. 39, did not apply. Matter of dispute arising, the defendants refused to appoint an arbitrator, and an award was made by arbitrators appointed by the plaintiffs. Previous to the making of the award the plaintiffs, under the provisions of the Common Law Procedure Act, 1854, had the submission to arbitration made a rule of the Court of Common Pleas. In a suit in which the plaintiffs

claim was for damages awarded by the arbitrator's and incurred by the plaintiffs in respect of the breach of the contract, *Held* the award was invalid. The making the submission a rule of Court has not the effect of depriving a party of his right to revoke, at any time before the award, the authority of arbitrators whom he has appointed: still less could it have any effect to prevent him from declining to appoint an arbitrator.

Held also, the contract was not within the scope of s. 28, Act IX of 1872. To make an agreement conform to Excep. 1 of that section, the jurisdiction of the Courts must be excluded in all respects except the matter which is the result of the arbitrators' award.

Agreements which exclude the jurisdiction of the Courts until an award is made, as in *Scott v. Avery*, are within that exception and are not illegal.

Quære.—Whether it was intended by that exception to authorize the Court to entertain a suit for specific performance of an agreement to refer to arbitration?

S. 28, Act IX of 1872, does not forbid an action for damages for the breach of such an agreement.

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CONTRACT ACT (IX OF 1872), s. 28—*Agreement to refer to Arbitration—Suit for Damages for Breach of Contract—Suit for Specific Performance of Contract to refer.*] A contract entered into between the plaintiffs and the defendants contained a clause that "in case of any dispute the same to be decided by two competent London brokers—one to be appointed by the buyers' and the other by the sellers' agents; such brokers' decision to be final," but did not provide that no action should be brought till such decision was pronounced. Matter of dispute arising, the defendants refused to appoint an arbitrator. In a suit for damages for breach of the contract, *held*, that the contract was not one of the nature referred to in s. 28, Act IX of 1872. That section only refers to contracts which wholly or partially prohibit the parties absolutely from having recourse to a Court of Law. The first exception in that section applies only to a class of contracts where the parties have agreed that no action shall be brought, until some question of amount has first been decided by the arbitrators.

Semble.—A suit will not lie to enforce an agreement to refer to arbitration, even in the case referred to in the first exception to s. 28 of Act IX of 1872.

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ACTION FOR BREACH OF

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See ACT VIII OF 1859, ss. 92 & 93.

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COSTS—*Special Appeal—Order in Discretion of Lower Court.*]

Where, in a suit for defamation, a decree was given for the plaintiff for nominal damages, but he was ordered to pay the defendant's costs, *held*, that the order as to costs was in the discretion of the Court below, and therefore no special appeal would lie from such order: the rule as laid down in *Giridhari Lal Roy v. Sundar Bibi*, being, that an order as to costs cannot be interfered with in special appeal unless it is illegal.

Semble.—When the Court is of opinion that the plaintiff is not entitled to any substantial damages, it is not bound to award him nominal damages.

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COURT-FEES ACT (VII OF 1870), SCH. I., CLS. 11 & 12—*Probate Duty, Exemption from—Interest in Partnership Property.*] The testator, a member of the firms of G. A. & Co., of Calcutta, and O. G. & Co., of Liverpool, died in England, leaving a will, of which he appointed G in England and O in Calcutta his executors. As a partner in the Calcutta firm, the testator was entitled to a share in an indigo concern, and in certain immoveable property in Calcutta, and his share in these properties was, on his death, estimated, and the money-value thereof paid to his estate by the firm in Liverpool, and probate duty had been paid thereon by G in obtaining probate of the will in England. Shortly after the testator's death, the indigo concern was contracted to be sold, and the testator's name appearing on the title-deeds as one of the owners, O applied for probate of the will, to enable him to join in the conveyance and in any future sale of the other immoveable property. An unlimited grant of probate was made to O, who claimed exemption from probate duty in respect of the properties, on the grounds (a) that duty had already been paid in England on the testator's share in them, and (b) that there was no amount or value in respect of which probate was to be granted in India. *Held* on a case referred by the taxing officer that O was not entitled, in obtaining probate, to exemption from the probate duty payable under Sch. I., cl. 12 of the Court-fees Act, in respect of the properties.

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See ADOPTION, SUIT TO SET ASIDE.

CRIMINAL PROCEDURE CODE (ACT X OF 1872), s. 64—*Power of Judge acting in English Department.*] An application for the transfer of a case under s. 64 of the Criminal Procedure Code should be made, not by letter to the English Department of the High Court, but before the Court in its judicial capacity, and should be supported by affidavits or affirmation in the usual way.

THE QUEEN v. ZUHIEUDDIN 219

—, s. 272—*Arrest pending Appeal.*] In an appeal under s. 272 of Act X of 1872, the High Court has power to order the accused to be arrested pending the appeal.

THE QUEEN v. GOBIN TEWARI 281

—, ss. 294, 295, 296, & 297—*Order of Discharge under s. 215—Revival of Proceedings.*] An order of a District Magistrate, directing the revival of certain criminal proceedings against the petitioners who had been discharged under s. 215 of the Criminal Procedure Code by a Subordinate Magistrate after evidence had been gone into, quashed as illegal and *ultra vires*.

As the case was one of improper discharge, and came before the Magistrate under s. 295 of the Criminal Procedure Code, the proper and only course for him was to report it for orders to the High Court, which, if of opinion that the accused were improperly discharged, might, under s. 297, have directed a retrial.

The case of *Sidya bin Satya* differed from.

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CRIMINAL PROCEDURE CODE (Act X of 1872), s. 471—Act XXIII of 1861, s. 16—*Order sending Case to Magistrate for enquiring into Offence of giving False Evidence—Preliminary Enquiry—Vagueness of Charge.* Although s. 16 of Act XXIII of 1861 gives Civil Courts powers similar to those conferred on Civil and Criminal Courts alike by s. 471 of the Criminal Procedure Code, the whole law as to the procedure in cases within those sections is now embodied in s. 471 of the Criminal Procedure Code.

In a suit brought to recover possession of certain property, the Judge decided one of the issues raised in the plaintiff's favour, but on the important issue as to whether the plaintiff ever had possession, he found for the defendant. The plaintiff was not examined, but on the issue as to possession he called two witnesses. The Judge disbelieved their statements, and considering that the plaintiff had failed to prove his case, he gave judgment for the defendant without requiring him to give evidence on that issue. In the concluding paragraph of his judgment, the Judge directed the depositions of the two witnesses above referred to, together with the English memoranda of their evidence, to be sent to the Magistrate, with a view to his enquiring whether or not they had voluntarily given false evidence in a judicial proceeding; and he further directed the Magistrate to enquire whether or not the plaintiff had abetted the offence of giving false evidence, on the ground that as the witnesses were the plaintiff's servants he must personally have influenced them, and also to enquire whether the plaintiff which the plaintiff had attested contained averments which he knew to be false. On a motion to quash this order, *held*, that, under s. 471 of the Criminal Procedure Code, the Judge has no power to send a case to a Magistrate except when, after having made such preliminary enquiry as may be necessary, he is of opinion that there is sufficient ground (*i.e.*, ground of a nature higher than mere surmise or suspicion) for directing judicial enquiry into the matter of a specific charge, and that the Judge is bound to indicate the particular statements or averments in respect of which he considers that there is ground for a charge into which the Magistrate ought to enquire, and that the order was bad because the Judge had made no preliminary enquiry and because it was too vague and general in its character.

THE QUEEN *v.* BAIJOO LALL. IN THE MATTER OF THE PETITION OF BAIJOO LALL 450

CROPS, SUIT FOR VALUE OF 183
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DAMAGES FOR BREACH OF AGREEMENT TO REFER TO ARBITRATION, SUIT FOR 42
See CONTRACT ACT, s. 28.

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See CONTRACT ACT, s. 28.

MEASURE OF—*Action for Breach of Contract—Collateral Contract.* The defendant entered into a contract with the plaintiffs to purchase from them a quantity of gunny bags, of which the defendant was to take delivery at certain stated times. On failure by the defendant to take delivery, the plaintiffs brought a suit for breach of the contract, estimating the damages at the difference between the contract price and the market prices on the days when the defendant ought to

<p>have taken delivery. It was proved that the plaintiffs never had the goods in their possession, but that they could have obtained them under a contract they had with a third person, and it was found that the plaintiffs were ready and willing to deliver them at the time contracted for. The Lower Court held that the measure of damages was the difference between the contract price of the bags and the amount which it cost the plaintiffs under their collateral contract to procure and deliver them. <i>Held</i>, reversing the decision of the Court below, that the proper measure of damages was the difference between the contract price and the market prices at the dates of failure by the defendant to take delivery.</p>	
COHEN v. CASSIM NANA	264
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See COSTS.	
<p>————— SUIT FOR—<i>Joint Undivided Proprietors—Revenue Sale—Act XI of 1859, s. 40.</i>] No suit for damages as between joint owners of undivided estates will lie, in consequence of the sale of the whole estate through the default of one or more of such owners in paying their shares of the Government revenue.</p>	
LALLAH RAMESSHUR DOYAL SINGH v. LALLAH BISSEN DOYAL	406
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<p>DECLARATORY DECREE—<i>Consequential Relief—Act VIII of 1859, s. 15—Jurisdiction of Civil Courts.</i>] A granted a lease of his entire property to the plaintiff for a term of years, with power to enhance the rents and make settlements. Immediately after A executed a pottah in favour of B, covering a portion of the same estate, whereby B's rent was to remain unchanged for a period conterminous with the plaintiff's lease. In a suit by the plaintiff against B and A's representative to have the pottah set aside, it was objected that, inasmuch as the deed had not been as yet set up against the plaintiff, nor any injury shown to have been occasioned to him thereby, he had no cause of action: <i>held</i>, that the suit was maintainable.</p> <p>In laying down the rule that "a declaratory decree cannot be made, unless there be a right to consequential relief," the Privy Council did not intend to deny to the Courts of this country the power to grant decrees in any case in which, independently of the provisions of Act VIII of 1859, s. 15, they had the power to grant a decree. This power is generally the same as that of the Court of Chancery in England.</p>	
RAM NEEDHEE KOONDOL v. RAJAH RUGHOO NATH NARAIN MULLO	456
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DURESS— <i>Imprisonment—Avoidance of Contract.</i> An agent employed by the plaintiff to purchase timber for him in the Siamese territory was imprisoned by an officer of the Siamese Government, on a charge brought against him by the defendant of stealing timber. In order to obtain his release he contracted to purchase from the defendant, for the plaintiff, the timber which he was charged with stealing, at a price much beyond its value. <i>Held</i> , that the plaintiff might repudiate the contract as obtained under duress.	
In England the mere fact of imprisonment is not deemed sufficient to avoid an agreement made by one who is in lawful custody under the regular process of a Court of competent jurisdiction, where no undue advantage is taken of the situation of the party making the agreement. But in a country in which there is no settled system of law or procedure and where the Judge is invested with arbitrary powers, imprisonment may in itself amount to duress such as will avoid a contract entered into by the prisoner with a view of obtaining release.	
MOUNG SHOAY ATT v. KO BYAW	
EASEMENT— <i>Prescription—User—Limitation Act (IX of 1871), s. 27.</i> In a suit for declaration of the plaintiff's right of way over a lane leading from a public road to a door in the plaintiff's house, which lane the defendant, who resided at the end of the lane, had obstructed so as to prevent access to the plaintiff's house, it appeared that the house in respect of which the easement was claimed belonged in 1855 to one HC, during the time of whose occupation there was user of the right of way over the lane to	330

the door, until he had the door bricked up. In April 1865 the house was sold by *HC*, and in June 1867 was conveyed by the purchaser to the plaintiff. From the blocking up of the door until the plaintiff's purchase no user was proved. The suit was brought in June 1875, about a month after the erection by the defendant of the obstruction complained of. *Held*, both in the Court below and on appeal, that the owner of the dominant tenement having, with the intention of preventing the use of the way, created an obstruction of a permanent nature which rendered such use impossible, the way could not be said, during the continuance of such obstruction, to have "been openly enjoined" within the meaning of s. 27 of Act IX of 1871, and that, accordingly, though there had been no interruption within the meaning of that section, a right to the way had not been established under the Act.

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EVIDENCE ACT (I OF 1872), ss. 25, 26, & 167—*Admissibility in Evidence of Confession—Police Officer also a Magistrate—Deputy Commissioner of Police in Calcutta—Letters Patent, 1865, s. 26—Case certified by Advocate-General.* The prisoner, on his arrest, made a statement in the nature of a confession, which was reduced into writing by one of the inspectors in whose custody the prisoner was, and subsequently signed and acknowledged by the prisoner in the presence of the Deputy Commissioner of Police at the Police office, the Deputy Commissioner receiving and attesting the statement in his capacity of Magistrate and Justice of the Peace. At the trial of the prisoner at the Criminal Sessions of the High Court, this statement was tendered in evidence against him, and admitted by the Judge, who overruled an objection on behalf of the prisoner, that under s. 25 of the Evidence Act it was inadmissible. On a case certified by the Advocate-General under cl. 26 of the Letters Patent, *held* that the confession was, under s. 25 of the Evidence Act, not admissible in evidence.

Per GARTH, C.J.—S. 26 of the Evidence Act is not to be read as qualifying the plain meaning of s. 25. In construing s. 25 the term "police officer" is not to be read in a technical sense, but in its more comprehensive and popular meaning.

Per Curiam.—S. 167 of the Evidence Act applies as well as to criminal as to civil cases.

Per GARTH, C.J. (PONTIFEX, J., doubting).—The Court which under that section is to decide upon the sufficiency of the evidence to support the conviction is, in a case coming before the Court and under s. 26 of the Letters Patent, the Court of review, not the Court below. Such decision is to be come to on being informed by the Judge's notes, and if necessary by the Judge himself, of the evidence adduced at the trial.

Per Curiam.—Apart from s. 167, the Court has power, in a case under cl. 26 of the Letters Patent, to review the whole case on the merits, and affirm or quash the conviction.

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<i>See</i> CHARITABLE GIFT.	

FAMILY CUSTOM—Primogeniture—Mitakshara Law—Joint and separate Property—Impartibility.] Although an estate be not what is technically known in the north of India as a *raj*, or what is known in the south of India as a *polliam*, the succession thereto may, under a *kulachar*, or family custom, be governed by the rule of primogeniture.

Where the family to which ancestral property held in this peculiar manner belongs is subject to the Mitakshara law, and the property is not separate, the succession, in the event of a holder dying without male issue, is given to the next collateral male heir in preference to the widow or daughters of the deceased holder.

That an estate is impartible does not imply that it is separate, and so to be governed by the law applicable to separate succession.

Whether the general status of a Hindu family be joint or divided, property which is joint will follow one, and property which is separate will follow another, course of succession.

Since in documents between Hindus and in the Mitakshara itself it is not unusual to find the leading members of a class alone mentioned when it is intended to comprehend the whole class, a written statement of a family custom, whereby an impartible estate passes in the event of the holder dying without issue to his younger brother or his eldest son, need not to be construed as limiting the collateral succession to the two cases named, but as providing generally that on failure of the direct male line, the nearest male heir in the collateral line shall succeed.

CHINTAMUN SING *v.* NOWLUKHO KONWARI 158

Regs. XI of 1793 & X of 1800—Discontinuance of Family Custom.] In a suit to recover possession of an estate by virtue of an alleged family custom, under which the estate was descendible to the eldest son to the exclusion of the other sons, and was impartible and inalienable, it was uncertain what the nature or origin of the tenure of the estate was, but there had been admittedly a settlement of it by Government at the time of the perpetual settlement. *Held*, assuming the custom to have existed, that although by such settlement any incidents of the old tenure of the estate were impliedly at an end, yet the settlement did not of itself operate to destroy the family usage, even though the origin of it could not be shown.

Quære.—Whether Regulation XI of 1793 or Regulation X of 1800 would govern a case where the claim rested only on a continuing family usage?

Held on the evidence, that from the acts of the members of the family, the manner of succession to the estate, even if it prevailed as alleged, was probably not regarded by them in the light of a family custom, but as one of the incidents or conditions of tenure; and that since the settlement by Government the family had considered all these incidents at an end, and had treated the estate as an ordinary estate held under the Government, and subject to the ordinary laws

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of succession. Assuming the custom to have existed, it was of a nature which could, without any violation of law, be put an end to. There appears to be no principle or authority for holding that a manner of descent of an ordinary estate, depending solely on family usage, may not be discontinued either accidentally or intentionally, so as to let in the ordinary law of succession. Such family usages are in their nature different from a territorial custom, which is the <i>lex loci</i> binding all persons within the local limits in which it prevails.	
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<i>See</i> SMALL CAUSE COURT, CALCUTTA, CONSTITUTION OF	
HIGH COURTS' CRIMINAL PROCEDURE ACT (X OF 1875), s. 147— <i>Case transferred to High Court—Refund of Fine on Quashing Conviction—Notes of Evidence taken by Magistrate.</i> The High Court has no power, under s. 147, Act X of 1875, to order a fine to be refunded on quashing a conviction. The Court in this instance decided whether the case should be transferred under s. 147 on the notes of the evidence taken by the Magistrate at the trial.	
THE QUEEN ON THE PROSECUTION OF MORAD ALI v. HADJEE JEBUN BUX	354
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<i>Notice to Prosecutor—</i>	
<i>Penal Code, ss. 292 & 294—Specific Charge—Procedure on Transfer to High Court.] In an application for the transfer of a case under s. 147, Act X of 1875, in which the prisoner has been convicted and is undergoing imprisonment, it is in the discretion of the Court to order, for sufficient <i>prima facie</i> cause shown, that the case be removed without notice to the Crown.</i>	
<i>Semble.</i> —A charge under ss. 292 and 294 of the Penal Code should be made specific in regard to the representations and words alleged to have been exhibited and uttered, and to be obscene; and the Magistrate, in convicting, should in his decision state distinctly what were the particular representations and words which he found on the evidence had been exhibited and uttered, and which he adjudged to be obscene within the meaning of those sections. Where no such specific decision has been given, the High Court, when the case has been transferred under s. 147, Act X of 1875, may either try the case <i>de novo</i> , or dismiss it on the ground that the Magistrate has come to no finding on which the conviction can be sustained.	
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— *Contract—Interest.*] The rule of Hindu law, prohibiting the recovery of interest exceeding in amount the principal sum lent, is not applicable to suits brought in Mofussil Courts in Bengal.

DEEN DOYAL PORAMANICK v. KYLAS CHUNDER PAL CHOWDHRY .	92
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— *Deed of Gift to Widow, Construction of.*] In this case the decision of the High Court reported in 7 B. L. R., 93, was reversed by the Privy Council, who held that the effect of the instruments was to give the widow an estate for life with power to use the proceeds as she chose, and consequently that the proceeds, or property purchased by her out of the proceeds, would belong on her decease to her heirs.

BHAGBUTTI DEYI v. BHOLANATH THAKOOR	104
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— *Inheritance—Brothers of the whole blood and of the half blood.*] By the Hindu law current in Bengal, a brother of the whole blood succeeds in the case of an undivided immoveable estate in preference to a brother of the half blood.

RAJKISHORE LAHOORY v. GOBIND CHUNDER LAHOORY.	
RAMMONEY DOSSEE v. GOBIND CHUNDER LAHOORY	27

— *Inheritance—Stridhan.*] With respect to property given to a woman after her marriage by her husband's father's sister's son, the brother, mother, and father are preferable heirs to the husband.

HUREYMOHUN SHAHA v. SONATUN SHAHA	275
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— *Inheritance—Sudras—Illegitimate Sons—Validity of Marriage between persons of different Castes.*] According to the doctrines of the Bengal school of Hindu law, a certain description only of illegitimate sons of a Sudra by an unmarried Sudra woman is entitled to inherit the father's property in the absence of legitimate issue, viz., the illegitimate sons of a Sudra by a female slave or a female slave of his slave.

Per MITTER, J.—Marriage between parties in different subdivisions of the Sudra caste is prohibited unless sanctioned by any special custom, and no presumption in favor of the validity of such a marriage can be made, although long cohabitation has existed between the parties.

Per MARKBY, J.—*Quære*—Whether there is any legal restriction upon such a marriage?

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— *Mitakshara—Undivided Share and Joint Family Property—Succession—Decree in Suit—Against Widow—Misjoinder.*] On the death without issue of a member of a Hindu family joint in estate and subject to the Mitakshara law, his undivided share in the joint family property passes to the surviving members of the joint family and not to his widows, and cannot be made liable for his debts under decrees obtained against his widows as his representatives.

Quære.—Where a member of a joint Hindu family governed by the Mitakshara law, without the consent of his co-sharers, and in order to raise money on his own account, and not for the benefit of the joint family, mortgages in his lifetime his undivided share in a portion of the joint family property, can the other members of the joint family, on his death, recover from the mortgagee the mortgaged share, or any portion of it, without redeeming?

A suit by a surviving member of a joint Hindu family subject to the Mitakshara law, to recover a moiety of the undivided share of a deceased member of the family in the joint family property, ought not to be dismissed on the ground that all the members of the family have not joined in bringing the suit, where it appears that the only other surviving member of the family has already sued for and recovered his moiety of the property, and disclaims all further interests, and is joined as a co-defendant in the suit.

PHOOLBAS KOONWAR *v.* LALLA JOGESHWAR SAHAY 226

HINDU LAW—*Mitakshara—Widow—Maintenance—Joint Ancestral Business—Debts incurred by Manager of Joint Family in trading.*] A joint family property acquired and maintained by the profits of trade is subject to all the liabilities of that trade.

Ramlal Thakursidas v. Lakmichand followed.

JOHURRA BIBEE *v.* SREBGOPAL MISSEER 47

—————*Widow—Maintenance—Lien on Estate of Husband—Bond fide Purchaser.*] The lien of a Hindu widow for maintenance out of the estate of her deceased husband is not a charge on that estate in the hands of a *bond fide* purchaser irrespective of notice of such lien.

A Hindu widow, before she can enforce her charge for maintenance against property of her deceased husband in the hands of a purchaser from his heir, must show that there is no property of the deceased in the hands of the heir.

Debts contracted by a Hindu take precedence of his widow's claim for maintenance, and *semble*, that if a portion of his property is sold after his death to pay such debts, the widow cannot enforce her charge for maintenance against such property in the hands of the purchaser.

Quere.—Whether a Hindu widow, by obtaining against her husband's heir a personal decree for maintenance unaccompanied by any declaration of a charge on the estate, does not lose her charge upon the estate.

ADHIRANEE NARAIN COOMARY *v.* SHONA MALEE PAT MAHADAI 365

—————*Widow, Sale of Right, Title, and Interest—Execution of Decree—Arrears of Maintenance—Rights acquired by Auction-Purchaser.*] *C*, a Hindu, inherited from his father property charged, under the Mitakshara law, with the maintenance of *N*, his mother. *C* dying without issue, his property passed to *D*, his widow, who allowed the maintenance of *N* to fall into arrears. *N* brought a suit against *D* personally for the amount of the arrears, and obtained a money-decree, in execution of which *D*'s right, title, and interest in the property left by her husband were sold. Neither the decree nor the sale proceedings declared the property itself to be liable for the debt. In a suit by the reversionary heir of *C*, after the death of *D*, to establish his right of inheritance to, and to recover possession of *C*'s estate, *Held*, that the purchaser at the execution-sale took only the widow's interest, and not the absolute estate, and therefore the plaintiff was entitled to recover.

BAIJUN DOOBEY *v.* BRIJ BHOOKUN LALL AWUSTI 133

—————*Will—Clause restraining Partition or Enjoyment.*] Where a Hindu testator gave all his immoveable property to his sons, but postponed their enjoyment thereof by a clause that they should not make any division for twenty years, *Held*, that the restriction was void as being a condition repugnant to the gift, and that the sons were entitled to partition at once.

MOKOONDO LALL SHAW *v.* GONESH CHUNDER SHAW 104

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<hr/> <p style="text-align: center;"><i>Married Woman's Property Act (III of 1874), ss. 7 & 8—Succession Act (X of 1865), s. 4—Action for Trover—Wife against Husband.</i> The plaintiff was, at the time of her marriage in 1870, possessed in her own right of certain articles of household furniture, given to her by her mother. Since January 1875 she had lived separate from her husband, but the furniture remained in his house. In February 1875, her husband mortgaged the property to B, without the plaintiff's knowledge or consent. In June 1875, one KCB, a creditor, obtained a decree against the husband, and B, in execution of which he seized the furniture as the property of the husband, and it remained in Court subject to the seizure. In July 1875 the plaintiff instituted a suit in her own name in trover to recover the articles of furniture or their value from her husband, on the ground that they were her separate property, and in August 1875 she preferred a claim in her own name to the property under s. 88 of Act IX of 1850. It was found on the facts that the furniture was the property of the plaintiff. The husband and wife were persons subject to the provisions of the Succession Act, s. 4, and the Married Woman's Property Act, 1874.</p> <p><i>Held</i> that, under s. 7 of the latter Act, the suit was maintainable against the husband.</p> <p><i>Held</i>, also, that the judgment for the plaintiff in the suit, to recover the furniture or its value from the husband, could not, without satisfaction, have the effect of vesting the property in the husband from the time of the conversion, and therefore the claim under Act IX of 1850 was also maintainable.</p> <p><i>Brinsmead v. Harrison</i> followed.</p> <p>HARRIS v. HARRIS.</p> <p>HARRIS v. KOYLAS CHUNDER BANDOPADIA 285</p>	
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ISTEMRARI MOKURRARI TENURE— <i>Death of Grantee without Heirs</i> <i>—Escheat—Recognition of Tenancy.</i>] Lands belonging to a zamindari granted by the zamindar under an absolute hereditary mokurrari tenure, do not, on the death of the grantee without heirs, revert to the zamindar; nor does the zamindar, under such circumstances, take by escheat a tenure subordinate to and carved out of his zamindari.	
Where there is a failure of heirs, the Crown by the general prerogative will take the property by escheat, subject to any trusts or charges affecting it; and there is nothing in the nature of a mokurrari tenure which should prevent the Crown from so taking it subject to the payment of the rent reserved under it.	
The recognition by the owner of lands of the interest of parties in possession by the receipt of rent from them, constitutes a tenancy requiring to be determined by notice or otherwise before such parties can be treated as trespassers.	
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<i>See DECLARATORY DECREE.</i>	
JURISDICTION— <i>Suit for Land—Letters Patent, 1865, cl. 12—Injunction.</i>] In a suit brought against the owners of a mine adjacent to a mine belonging to the plaintiffs, the plaint alleged that a certain boundary line existed between the two mines, and prayed for a declaration that the boundary line was as alleged, and that the defendants might be restrained by injunction from working their mine within a certain distance from such boundary line. The defendants in their written statement disputed the plaintiffs' allegation as to the course of the boundary line. The mines were situated out of the jurisdiction of the High Court, but both the plaintiffs and defendants were personally subject to the jurisdiction. <i>Held</i> that	

the suit was a suit for land within cl. 12 of the Letters Patent, and therefore one which, the land being in the mofussil, the Court had no jurisdiction to try.

On the facts stated in the plaint and before the filing of the defendant's written statement the Court granted an *interim* injunction, and refused an application to take the plaint off the file.

THE EAST INDIAN RAILWAY COMPANY v. THE BENGAL COAL COMPANY

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JURISDICTION—*Suit for Land letters Patent, 1865 cl. 12—Deed of Trust giving Trustees Power of Sale of Land in the Mofussil—Suit by Creditor to have Trusts carried out.*] *M* and *L* were the joint absolute owners of certain laid in the mofussil, *M* having a 14-anna share, and *L* the remaining 2-anna share, therein. During the absence of *L* in England, *M* executed, on behalf of himself and *L*, a deed of assignment of the whole of the property to trustees, for the benefit of the creditors of the estate, which was heavily encumbered, on trust to sell the land and distribute the assets to the creditors. The Trustees accepted the trust, but difficulties afterwards arose in carrying them out. A suit was thereupon instituted by the plaintiff, a creditor, on behalf of himself and the other creditors, the plaint in which alleged that the trustees were desirous of being discharged, and prayed that the trusts might be carried into effect; that the trustees might be removed; and that a Receiver might be appointed to carry out the trusts. To this suit the trustees and *M* and *L* were made defendants. *L*, who was in England, denied any power in *M* to execute the deed on his behalf: the trustees and *M* were personally subject to the jurisdiction. *Held per PHEAR, J.*, in the Court below, that the plaint disclosed a good cause of action, as the Court, if it had jurisdiction, would have power to make a declaration binding against *L* as to the validity of the deed of trust, to appoint a Receiver of the estate, and to direct a sale which would be binding on *M* and *L*; but that the suit being one "for land," within the meaning of cl. 12 of the Letters Patent, the Court had no jurisdiction to try it.

Held on appeal that the suit, having for its object to compel a sale of the whole of the land, including *L*'s share, the title to which was disputed, was a "suit for land" within the meaning of cl. 12 of the Letters Patent, and that the Court had no jurisdiction to try it.

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LESSOR AND LESSEE— <i>Lease granted while Lessor is out of Possession—Rights of Lessee—Suit for Possession.</i>] A transfer of property, of which the transferor is not at the time of the transfer in possession, is not <i>ipso facto</i> void.	

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Where a patnidar, while out of possession of the patni estate, granted a durpatni thereof, *held* that the durpatnidar's suit against third persons, who were in possession of the estate, to recover possession, would lie, it appearing that the plaintiff had paid an adequate consideration for the durpatni, and that the durpatni potta was not evidence of a contract to be performed in future on the happening of a certain contingency, or that if it were so that the plaintiff had done all he was bound to do to entitle him to specific performance of the agreement by the putnidar.

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— Act VIII of 1859, s. 246—*Disability under ss. 11 and 12, Act XIV of 1959.*] The limitation of one year, provided by s. 246 of Act VIII of 1859, is subject, in the case of a minor, to be modified by ss. 11 and 12 of Act XIV of 1859.

Mahomed Bahadur Khan v. The Collector of Bareilly distinguished, on the ground that it was decided on an Act of a very special nature.

The benefit of ss. 11 and 12 of Act XIV of 1859 is not limited to the period when the disability of minority has ceased, but applies also to the period during which the disability continues; and therefore, during the latter period, it is open to the minor to sue by his guardian.

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— Act XIV of 1859, s. 1, cls. 10, 12, 16—*Interest in Immoveable Property.*] B, having borrowed money from A, executed in his favor a bond (which was afterwards duly registered), in which he engaged to repay the amount with interest on a day named, and hypothecated certain lands by way of security, with a condition that, in the event of the said lands being sold in execution of decree before the day fixed for repayment, A should be at liberty at once to sue for the recovery of the debt. Before the term for repayment expired, the mortgaged lands were sold in execution of a decree obtained by another creditor on a second bond made by B, subsequently and subject to the bond made to A. In a suit by A against B and the purchasers of the lands at the execution-sale, A charged B personally, and also sought to realize the amount due on his bond by the sale of the mortgaged lands. *Held*, that the claim was

in substance a suit for the recovery of immoveable property, or of an interest in immoveable property, within the meaning of cl. 12, s. 1, Act XIV of 1859, and consequently was governed by the twelve years' rule of limitation therein provided, and not by the rules provided by cls. 10 and 16 of the same section.

Semle.—Although A was at liberty to sue from the date of the sale of the lands, limitation did not run against his claim from that date, but only from the date fixed in the bond for repayment.

JUNESWAR DASS *v.* MAHABEER SINGH

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LIMITATION—Act IX of 1871, Sch. II, No. 72—*Promissory Note payable on Demand.*] The defendant gave the plaintiff a promissory note on the 5th August 1869, payable on demand with interest at 5 per cent. per annum. No sum either in respect of principal or interest was paid on the note, and payment was demanded for the first time in November 1875. Act XIV of 1859 contains no provision as to the date of the accrual of the cause of action in a suit on a promissory note payable on demand, but Act IX of 1871, which repeals Act XIV of 1859, and which applies to suits brought after the 1st April 1873, provides that the cause of action in such a suit shall be taken to arise on the date of the demand. In a suit brought on the note after the demand, *held* that the cause of action arose at the date of the note, and as a suit on it would have been barred under Act XIV of 1859 if brought before the 1st April 1873, the sequent repeal of that Act would not revive the plaintiff's right to sue.

NOCOR CHUNDER BOSE *v.* KALLY COOMAR GHOSE

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See HINDU LAW.

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MAJORITY ACT (IX OF 1875), s. 3—*Minor—Guardian ad litem.*]

The appointment of a guardian *ad litem* is sufficient to make the minor party subject to s. 3, Act IX of 1875, and to constitute his period of majority at 21, at any rate so far as relates to the property in suit, notwithstanding that such minor would but for such appointment have attained majority at 18.

SUTTYA GHOSAL *v.* SUTTYANUND GHOSAL

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AGE OF—*Hindu Law—Act XL of 1858—Unconscionable Agreement—Usury.*] A Hindu, resident and domiciled in Calcutta, and possessed of lands in the mofussil, borrowed in Calcutta a sum of money from the plaintiff, a professional money-lender, and agreed by his bond to repay the principal with interest at 36 per cent. per annum in Calcutta. The defendant's age, at the time he executed the bond, was sixteen years and one or two months; but neither his person nor his property had been taken charge of by the Court of Wards, or by any Civil Court. The defendant, having made default in payment, the plaintiff brought the present suit. The defendant pleaded his minority.

Held by the Full Bench that the law as to the age of minority governing the case was not Act XL of 1858, but the Hindu law, under

which the defendant was not a minor at the time he executed the bond and that therefore he was liable on it.	
On the merits of the case the lower Court (PHEAR, J.) found that the agreement was unconscionable and one which a Court of Equity would not enforce. <i>Held</i> by the Appeal Court (GARTH, C.J., and MACPHERSON, J.), in accordance with the decision of Phear, J., that the plaintiff was only entitled to a decree for the amount actually received by the defendant from him, with interest at 6 per cent.	
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MORTGAGE.— <i>Lien of Mortgagee on sale of Right, Title, and Interest of Mortgagor—Writ of ft. fa.—Purchase at Sheriff's sale at instance of Mortgagee.</i> <i>N, M, and G</i> borrowed from <i>B</i> a sum of Rs. 12,000, to secure repayment of which they executed in her favour a joint and several bond in May 1863, for payment of the said sum with interest on the 6th May 1864, and also a warrant to confess judgment on the bond on the 27th April 1864. <i>N, M, and G</i> executed a mortgage, in the English form, of certain property to <i>B</i> , purporting to do so in pursuance of an agreement alleged to have been entered into between them and <i>B</i> at the time the money was advanced by <i>B</i> in 1863; but the evidence was not sufficient to show that such agreement had been entered into. Under a writ of <i>ft. fa.</i> , issued previously to the mortgage of 1864, <i>viz.</i> , on the 23rd of March	

1864, in a suit against *M* and *N*, the Sheriff sold to *A*, on the 7th July 1864, the right, title, and interest of *M* and *N* in the mortgaged property. Assuming that an agreement to mortgage had been entered into in 1863, *A* had no notice of such agreement. After this, a writ of *fi. fa.* was issued by the Sheriff, at the instance of *B*, in execution of a decree which *B* had caused to be entered upon the bond of May 1863; and under that writ the Sheriff, on the 22nd February 1866, sold the right, title, and interest of *N*, *M*, and *G* in the mortgaged property, and *A* became the purchaser. The purchase-money at this sale was paid to *B*, and *A* entered into possession of the property.

In a suit by *B* against *A* and others on the mortgage of the 27th of April 1864, for foreclosure or sale of the property, the Court below (*PHEAR, J.*) held:—

that the *fi. fa.*, issued on the 23rd of March 1864, previously to the mortgage, must be taken to have operated against the share of *M* and *N* from the date when it was issued;

that even if there was an agreement to mortgage, as alleged, then, although, as against *N*, *M*, and *G* themselves, a Court of Equity would treat such agreement as equivalent to an actual mortgage, yet it would not do so as against a purchaser under the *fi. fa.* without notice; and

that the sale of the 7th July 1864, therefore, passed the shares of *M* and *N* to *A* free of any rights or equities of *B*.

Further, that the sale by the Sheriff, of the 22nd February 1866, having been effected at the instance of *B*, for the purpose of realizing the mortgage-debt, was operative, as between *B* and *A*, to pass to *A* the entire shares of *N*, *M*, and *G* in the property free of *B*'s mortgage lien.

Held on appeal, that no agreement to mortgage being established, the sale by the Sheriff to *A* in 1864 overrode the mortgage to *B*, and passed to *A* the shares of *M* and *N*.

Held further, that the sale by the Sheriff in 1866 being of the right, title, and interest of *N*, *M*, and *G*, and made at the instance of *B*, without notice of her mortgage, and *B* having received the purchase money, which would appear to have been estimated on the value of to unencumbered shares, and no objection having been made to the sale by the mortgagors, who had allowed *A* to hold unchallenged possession ever since, the entire equitable estate in the share of *G* must be taken to have passed to *A*.

A mortgagee is not entitled by means of a money-decree obtained on a collateral security, such as a bond or covenant, to obtain a sale of the equity of redemption separately. To allow him to do so would deprive the mortgagor of a privilege which is an equitable incident of the contract of mortgage,—namely, a fair allowance of time to enable him to redeem the property.

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———— <i>Inspection of Documents—Rules of High Court of 6th June</i> 1874, 50, 52.] Where the defendant stated in an affidavit that a sche- dule annexed thereto contained a list of all the documents in his posses- sion or power relating to the suit, and a certain other document was not mentioned in the schedule, though referred to by the defendant in his written statement, <i>held</i> on the hearing of a summons to consider the sufficiency of the affidavit that the plaintiff could not cross-examine on the affidavit but could only show it was not an honest affidavit. The proper course was to apply for inspection of the particular document referred to in the written statement and omitted from the schedule, if inspection was needed.	
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————, GRANT OF— <i>Act XIII of 1875—Rule 4 of Rules of</i> <i>High Court, 22nd June 1875.] Act XIII of 1875 does not empower</i> <i>the High Court to grant probate limited to property in any Province or</i> <i>Presidency, in cases where an unlimited grant had been made extending</i> <i>only to property in another Province or Presidency before the passing</i> <i>of the Act.</i>	

Per Macpherson, J.—Rule 4 of the Rules of 22nd June 1875, as to grants of probate, only applies to grants of the class mentioned in Rule 1, *i.e.*, only to cases in which the application for probate is made after 1st April 1875, and not to cases in which the application was made before that date.

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RECEIVER, PROPERTY IN HANDS OF—*Order on Receiver to sell—Attachment in Mofussil—Execution of Decree.*] By a decree of the High Court obtained by *DM* in November 1871 in a suit on a mortgage brought by him against *BC* and *PC*, it was ordered that the suit should be dismissed against *PC*; that the amount found due on the mortgage should be paid to *DM* by *BC*; that the mortgaged property, some of which was in Calcutta and some in the mofussil, should be sold in default of payment, and any deficiency should be made good by *BC*. The property in Calcutta was sold under the decree, and did not realize sufficient to satisfy the decree. *DM*, thereupon, in August 1873, obtained an order for the transfer of the decree to the Mofussil Court for execution: after the transfer *BC* died in December 1874, leaving a widow and an adopted son his representatives, against whom the suit was revived. The decree, however, was returned to the High Court unexecuted.

In a suit for partition of the estate of *BC* deceased brought by *PC* against *BC* in the High Court, a decree was made in February 1871 for an injunction to restrain *BC* from intermeddling with the estate or the accumulations, and for the appointment of the Receiver of the Court as Receiver, to whom all parties were to give up quiet possession. *BC* was in that suit declared entitled to a moiety of the property in suit.

Held, on application by *DM* to the High Court for an order that the Receiver should sell the right, title and interest of the widow and son of *BC* in the estate in his hands to satisfy the balance of his debt,

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that <i>DM</i> was entitled to an order that their interest should be attached in the hands of the Receiver, and that the Receiver should proceed to sell the same.	
Property in the hands of the Receiver of the High Court cannot be proceeded against by attachment in the mofussil.	
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RES JUDICATA— <i>Act VIII of 1859, s. 2—Cause of Action.</i>] <i>B</i> , as adopted son and heir of <i>G</i> , instituted a suit to set aside certain putni leases, under which certain persons claimed to hold lands which had belonged to <i>G</i> . The defence was, that <i>B</i> was not the legally adopted son of <i>G</i> , and an issue on this point having been settled, <i>K</i> , who claimed to be the reversionary heir of <i>G</i> , was made a defendant under s. 73 of Act VIII of 1859; and it was eventually decided in that suit that <i>B</i> was the duly adopted son of <i>G</i> . <i>Held</i> , that a subsequent suit by <i>K</i> against <i>B</i> to set aside the adoption could not, on the principles laid down in the case of <i>Soorjomanee Dayee v. Suddanund Mohapatter</i> , be maintained.	
<i>Kriparam v. Bhagawan Das</i> overruled.	
KRISHNA BEHARI ROY v. BUNWARI LALL ROY	141

Suit for Rent—Subsequent Suit for Abatement of Rent.] The plaintiff obtained a putni lease of certain villages from the defendant in 1861 at an annual rent, and in 1865 was evicted from a portion of the property; she took no steps to obtain an abatement; but inasmuch as she did not pay any rent for the year 1871, the defendant brought a suit against her for the rent of that year. The plaintiff set up the defence that she was entitled to an abatement of Rs. 155 from her rent; the 155 rupees representing the annual value of the property which she had lost in consequence of the eviction. In that suit it was decided that the amount of abatement she was entitled to was Rs. 42. No appeal was made against that decision. In a suit brought by the plaintiff for the purpose of obtaining a permanent

abatement of her rent she claimed the precise measure of abatement, *viz.*, Rs. 155, which she had claimed in the suit brought against her by the defendant. *Held*, that the question was *res judicata*, it having been raised and decided in the former suit.

NORO DOORGA DOSSEE *v.* FOZBUX CHOWDHRY 200

RESUMPTION, SUIT FOR—*Onus Probandi*—*Auction-Purchaser*.] Certain lands which had been let out in putni were, on default by the putnidar in payment of rent, sold by auction under Reg. VIII of 1819 and purchased by *M*, who granted them in putni to the plaintiff. In a suit for resumption on the allegation that the defendants were in possession of a portion of the lands as invalid lakhiraj by withholding payment of the *māl* rent thereof from after 1793, the defence was that the lands in dispute were valid rent-free lands existing as such from before 1790. *Held* that, on the grounds of the decision of the Privy Council in *Harihar Mukopadhyaya v. Modhab Chandra Babu*, the principle that the onus is on the plaintiff to show that the lands are *māl* applies to cases where the plaintiff, as in the present case, is the representative of an auction-purchaser.

ARFUNNESSA *v.* PEARY MOHUN MOOKERJEE 378

RETURN TO WRIT OF HABEAS CORPUS 78

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SALE FOR ARREARS OF 406

See DAMAGES, SUIT FOR.

REVIEW—*Act VIII of 1859, s. 376—Error in Law*.] The production of an authority which was not brought to the notice of the Judge at the first hearing, and which lays down a view of the law contrary to that taken by the Judge, is not a sufficient ground for granting a review.

ELLEM *v.* BASHEER 184

ss. 367, 375—Power of Judge to review judgment of his Predecessor.] A Judge has no power to allow a review of his predecessor's judgment on the ground that he comes to a different conclusion on the facts of the case. The general words used in *ss. 376 and 378 of Act VIII of 1859* are controlled and restricted by the particular words, and it is only the discovery of new evidence, or the correction of a patent and indubitable error or omission, or some other particular ground of the like description, which justifies the granting of a review.

ROY MEGHRAJ *v.* BEEJOY GOBIND BURREAL 197

Act XXVII of 1860.] A review of judgment is admissible in proceedings under *Act XXVII of 1860*, although no express provisions for reviews are contained in the *Act*.

IN THE MATTER OF THE PETITION OF POONA KOORER 101

REVIVAL OF CRIMINAL PROCEEDINGS AFTER DISCHARGE 232

See CRIMINAL PROCEDURE CODE, *ss. 294—297*.

REVOCATION OF WILL 148

See SUCCESSION ACT, *s. 56*.

RIGHT OF SUIT—*Liability of Government—Acts done in Exercise of Sovereign Powers—21 & 22 Vict., c. 106—Matter of Revenue—21 Geo. III, c. 70, s. 8*.] The plaintiff, for some years before and up to 31st March 1874, carried on the business of a retail dealer in ganja and sidhi in Calcutta, and occupied for that purpose certain shops and godowns duly licensed under the Government Regulations with respect to such sales. The license had to be renewed annually, and might, for sufficient cause, be withdrawn at any time within the year which terminated on 31st March. On 4th March 1874, while the plaintiff was carrying on his business, the Superintendent of Excise for Calcutta put the right to sell ganja and sidhi for the year commencing the 18th April 1874 up to public competition, which was the usual way of distributing the yearly licenses. The sale notification contained a list of the shops with the

localities where they were situated, but the right was reserved in case of combination, or for other cause, to transfer, before settlement, any shop from the locality specified, to some locality in the neighbourhood; and the conditions of sale were stated to be: "that the Collector does not bind himself to accept the highest bid; that the settlement with the accepted auction-purchasers will be contingent on the approval by the Police authorities of the proposed locality of the shop, and the character of the applicant for license; that the person accepted as the auction-purchaser shall deposit at once a sum equal to the license fee payable for two months, and shall at the same time state in writing in what building his shop will be opened, it being understood that the above deposit will be returned to any person whose license is subsequently refused for Police reasons." At the sale the plaintiff was the highest bidder for the licenses for five shops for the sale of ganja and sidhi, and his bids were recorded; and he also paid the deposit due in respect of the licenses amounting to Rs. 968. Subsequently the Excise Authorities refused licenses to the plaintiff for the five shops, and failed to return the deposit made in respect thereof. In a suit brought by the plaintiff against the Secretary of State in Council for India, in which he alleged that the Government had accepted his bid, and thereby contracted with him to give him the licenses and allow him to carry on his trade in ganja and sidhi, and that by their not giving him licenses, and so forcing him to close his godowns and shops, they had committed a breach of contract for which he was entitled to damages,—*Held*, on the evidence, *per* PHEAR, J., that there was no contract between the plaintiff and the Government. *Held* also, both in the Court below and on appeal, even assuming there was a contract, that the suit was not maintainable, being in respect of acts done by the Government in the exercise of sovereign powers. Suits such as might, previous to the passing of 21 & 22 Vict., c. 106, have been brought against the East India Company, and subsequently against the Secretary of State in Council, are limited to suits for acts done in the conduct of undertakings which might be carried on by private individuals without sovereign powers.

NOBIN CHUNDER DEY v. THE SECRETARY OF STATE FOR INDIA	11
RULES OF HIGH COURT, 6TH JUNE 1874, ss. 50, 52	178
See PRACTICE.	

22ND JUNE 1875	52
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SALE BY SHERIFF UNDER WRIT OF FIERI FACIAS—*Sale subsequently declared invalid—Suit to recover Purchase-money—Liability of Execution-Creditor—Jurisdiction—Act VIII of 1859, ss. 201, 242.* The plaint in a suit by *A* against *B* stated that, in a suit in which *B* had recovered judgment against *C*, a writ of *f. fa.* was, on 18th June 1866, issued on the application of *B*, directing the Sheriff of Calcutta to levy the judgment-debt by seizure, and, if necessary, by sale, of the property of *C* in Bengal, Behar, and Orissa, or in any other districts which were then annexed or made subject to the Presidency of Fort William in Bengal; that the writ did not authorize the execution thereof against immoveable property in Oudh; that under the writ the Sheriff, acting under instructions from *B*, seized and put up for sale the right, title, and interest of *C* in a talook in Oudh, which was purchased by *D*, to whom the Sheriff executed a bill of sale, and on receipt of the purchase-money paid a portion thereof to *B* and the balance to *C*, and put *D* into possession of the property, and he remained for some time in possession and in receipt of the rents and profits; that, eventually in proceedings in Oudh, instituted by *D* for partition of the property purchased by him, the sale was pronounced to be null and void, and was set aside, and *D* was removed from possession; and that the plaintiff sued as the executor of *D* to recover the whole of the purchase-money from *B*. *Held*, on appeal, affirming the decision of Phear, J., that the plaint disclosed no cause of action: 1st, because a purchaser who, after

the execution of the conveyance, is evicted by a title to which the covenants in the conveyance do not extend cannot recover the purchase-money from his vendors; 2nd, because the Sheriff was not the agent of *B* for the sale of the property, and therefore no privity of contract existed between *B* and *D*; 3rd, because *D* having been for some time in possession of the property and in receipt of the profits thereof, there had not been a total failure of consideration, and the plaintiff accordingly could not maintain the action in its present shape, *viz.*, for money had and received.

The judgment of the High Court in *Biseswar Lal Sahoo v. Ramtuhul Singh* explained by Phear, J., and ss. 201 and 242 of Act VIII of 1859 observed upon.

DORAB ALLY KHAN *v.* KHAJAH MOHEEOODDEEN 55

SALE FOR ARREARS OF RENT—*Regulation VIII of 1819, ss. 8 & 14—Suit for Reversal of Sale—Service of Notice.*] Where, in a suit to set aside a putni sale under Reg. VIII of 1819, it was proved that the notice of sale was first stuck up in the cutcherry of the ijaradar (the mehal having been let out in ijara by the putnidar), and on the refusal of the ijaradar's gomasta to give a receipt of service, it was taken down, and subsequently personally served on the defaulting putnidar at his house, which was at some distance from the putni mehal, *held*, that the object of the provision in Reg. VIII of 1819 as to service of notice of sale is not only to give notice of sale to the defaulter, but also to the under-tenants, and to advertise the sale on the spot for the information of intending purchasers; but though those provisions had not been strictly complied with, yet as the plaintiff (the putnidar) did not allege that in consequence of the defective publication there was not sufficient gathering of intending purchasers, nor that the under-tenants were ignorant of the sale, and were prejudiced by such ignorance, nor that the mehal was sold below its value, *held*, that the defect did not amount to a "sufficient plea" under s. 14 for setting aside the sale.

Bykantha Nath Sing v. Maharajah Dhiraj Mahatab Chand Bahadur commented on and distinguished.

GOUREE LALL SINGH *v.* JOODHISTEER HAJRAH 359

— *Putni Tenure—Regulation VIII of 1819, s. 8, cl. 2, & s. 14—Date of Publication of Notice.*] The fact that the receipt of the notice of sale was dated the 15th of Bysack, and therefore did not show that the notice had been published at some time "previous to that day," so as to satisfy the provisions of s. 8, cl. 2 of Reg. VIII of 1819, was held not to be sufficient ground for setting aside the sale of a putni tenure for arrears of rent. There being nothing in the receipt to show the date on which the notice was published, no injury to the plaintiff having been proved, and it appearing that more than the time prescribed by the Regulation had elapsed before the sale actually took place, the Court refused to set aside the sale.

It would not be a "sufficient plea" within the meaning of s. 14 that the receipt had been obtained, or the notification published, on, instead of previous to, the 15th of Bysack.

MATUNGEE CHURN MITTER *v.* MOORRABY MOHUN GHOSE 175

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See DAMAGES, SUIT FOR.

— OF RIGHT, TITLE, AND INTEREST OF MORTGAGOR, LIEN OF MORTGAGEE IN 337

See MORTGAGE.

— WIDOW 133

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<i>See</i> MORTGAGE.	
SMALL CAUSE COURT ACT [(IX OF 1850), s. 42— <i>Power to restore Case struck off for default in Appearance.</i>] A Court of Small Causes, constituted under Act IX of 1850, can, during the same day, and at the sitting of the Court, <i>ex parte</i> restore a cause once struck out under s. 42, though the order for striking off may have been duly recorded. In such a case it would be open to the defendant to apply to set aside such <i>ex parte</i> order, and the sufficiency of the grounds of the application would be a question for the discretion of the Judge.	
SHIB CHUNDER MULLICK v. KISSEN DYAL OPADHYA	476
—————, CALCUTTA, CONSTITUTION OF— <i>Act IX of 1850 and Act XXVI of 1864—Writ of Habeas Corpus, Return to—Privilege from Arrest—Witness—Undertaking by Prisoner not to sue.</i> The Small Cause Court in the Presidency town is not a Court of co-ordinate jurisdiction with the High Court, but a Court of inferior jurisdiction and subject to the order and control of the High Court. Therefore, where on a prisoner being brought up to the High Court on a writ of <i>habeas corpus ad subjiciendum</i> the return of the jailor stated that the prisoner was detained under a warrant of arrest issued in execution of a decree of the Small Cause Court, <i>held</i> , that the return was not conclusive, but the prisoner was entitled to show by affidavit that he was privileged from arrest at the time he was taken into custody.	
<i>Held</i> also, that, on the facts shown in the affidavit, the prisoner was privileged at the time of his arrest.	
The prisoner was required before his discharge to give an undertaking that he would bring no action for damages for illegal arrest or false imprisonment against the Judges of the Small Cause Court, the bailiff, the jailor, or the judgment-creditor.	
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SUCCESSION ACT, s. 4	285
<i>See</i> HUSBAND AND WIFE.	
————— (X OF 1865), ss. 4 & 44— <i>Husband and Wife—Parties with English Domicile married in India—Succession to Moveable Property.</i> <i>HM</i> , a British subject, having his domicile in England, married in Calcutta, in April 1886, <i>C</i> , a widow, who at the time of the marriage had also an English domicile. <i>C</i> , after her marriage with <i>HM</i> , became entitled as next-of-kin to shares in the moveable properties of her two sons by her former marriage: these shares were not realized nor reduced into possession by <i>C</i> during her life. <i>C</i> died in 1872, leaving her husband, but no lineal descendants. In March 1874, <i>HM</i> filed his petition in the Insolvent Court, and all his property vested in the Official Assignee. In April 1875, letters of administration of the estate and effects of <i>C</i> were, with the consent of <i>HM</i> , granted to the Administrator-General of Bengal, by whom the shares to which <i>C</i> became entitled as next-of-kin of her sons were realized. In a special case for the opinion of the Court under Ch. VII, Act VIII of 1859, <i>held</i> , that the domicile of the parties being in England, the English law was to be applied, and therefore the Official Assignee as assignee of the estate of <i>HM</i> was entitled to the whole fund realized by such shares in the hands of the Administrator-General.	
S. 4 of the Succession Act does not apply in respect of the moveable property of persons not having an Indian domicile.	
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SUCCESSION ACT (X of 1865), s. 56— <i>Revocation of Will—Lawful Polygamous Marriage.</i>] The will of a Jew, made subsequently to his first marriage, but previously to a second marriage in the lifetime of his first wife, held to be revoked by such second marriage under s. 56 of the Succession Act.	
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—, s. 258— <i>Grant of Letters of Administration with Will annexed—Practice.</i>] Letters of administration with the will annexed may, under s. 258 of the Succession Act, be granted after the expiration of seven clear days from the death of the testator,	
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—24 & 25 Vict., c. 104, s. 15— <i>Act XXIII of 1861, s. 27.</i>] Under s. 15 of 24 & 25 Vict., c. 104, the High Court will not interfere with the decisions of the Courts below in cases in which a special appeal is forbidden by s. 27 of Act XXIII of 1861, and where there is no question of jurisdiction involved.	
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